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Note

Viewing Metropolitan Housing Authorities as Parties to Be Joined, if Feasible, in Fair Housing Suits: Will Minnesota Break "A Great Silence?"¹

Elizabeth B. Bowling

I. INTRODUCTION

Racial segregation persists² in publicly funded housing despite judicial³ and regulatory⁴ mandates to integrate.⁵ Federal and state constitutions⁶ and statutes⁷ require the over 3,000

1. Drew S. Days, III, *Introductory Remarks, The Fair Housing Act After Twenty Years, A Conference at the Yale Law School March 25-26, 1988*, 6 YALE L. & POL'Y REV. 332, 334-35 (1988) (stating "[t]here has been a great silence on fair housing issues in recent years").

2. Mary K. Nenko, *Urban Policy Revisited—Issues Surface With a New Urgency*, 3(3) J. OF PLANNING LIT. 253, 261 (1988). In addition to stratifying communities by economic class, this trend segregates communities by race. COUNCIL OF METROPOLITAN AREA LEAGUES OF WOMEN VOTERS (CMAL), METROPOLITAN SCHOOL DESEGREGATION AND INTEGRATION STUDY: A STUDY TO FOCUS ON PROPOSALS FOR INTEGRATING METROPOLITAN AREA SCHOOLS OF THE TWIN CITIES AREA OF MINNESOTA 27 (1990) [hereinafter CMAL]; DOUGLASS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 14, 15 (1993); Gary Orfield, *Ghettoization and Its Alternatives*, in THE NEW URBAN REALITY 161, 168 (Paul Peterson ed., 1985); David Rusk, *Reuniting City and Suburb: The Key to Inner City Progress*, 2 POVERTY & RACE 1, 2 (1993) (excerpted from DAVID RUSK, CITIES WITHOUT SUBURBS (1993)).

3. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976) (ordering desegregation throughout the Chicago metropolitan housing market).

4. See, e.g., 24 C.F.R. § 590.905 (1993) (requiring communities receiving federal funds called Community Development Block Grants (CDBG's) to take active steps to promote fair housing).

5. These mandates take a range of forms from injunctions against intentional segregation to orders to actively promote opportunities to integrate. See generally, Florence Wagman Roisman & Phillip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 CLEARINGHOUSE REV. 313 (1990) (summarizing current remedies for segregation). For this Note's purposes, full integration means the presence throughout the metropolitan area, represented in concentrations roughly approximate to percentage of the metropolitan population as a whole, of all racial groups.

6. See generally, U.S. CONST. amends. V & XIV (providing the basis for due process and equal protection claims). See also, Southern Burlington Co.

public housing agencies (PHA's) operating across the country⁸ to correct racial segregation in publicly funded housing.⁹ Nevertheless, two continuing forms of racial segregation contribute to the concentration of persons of color in low-income urban housing projects¹⁰ and conversely, to the concentration of whites in the more affluent suburban communities:¹¹ namely, segregation among people within a single community¹² and segregation between communities.¹³ Traditional remedies, including efforts of local PHA's acting alone,¹⁴ can only address the former, intra-community segregation.¹⁵ Metropolitan-wide segregation results from the exclusion by many communities of housing amenable to public funding.¹⁶ As a result of metropolitan-wide segregation, the concentration of persons of color in substandard

NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975) (interpreting state constitutional provisions to prohibit discrimination against low-income persons).

7. *E.g.*, The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1988); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988); 42 U.S.C. §§ 1981-1983 (1988); the United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (current version at 42 U.S.C. §§ 1437-1437s (1988)); the Minnesota Human Rights Act MINN. STAT. § 363 (1992).

8. Telephone Interview with Information Department, Public Housing Authority Ass'n, Washington, D.C. (Sept. 27, 1993). Of these PHA's, hundreds are metropolitan PHA's that operate at the county or metropolitan government level. Telephone Interview with Information Specialist, Council of Large Public Housing Authorities, Washington, D.C. (Oct. 1, 1993).

9. Roisman & Tegeler, *supra* note 5, at 314.

10. Rusk, *supra* note 2, at 4; MASSEY & DENTON, *supra* note 2, at 15.

11. MASSEY & DENTON, *supra* note 2, at 11.

12. *Id.*; Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 757 n.78 (1993).

13. Dubin, *supra* note 12, at 755.

14. Traditional civil rights claims cannot reverse segregation patterns because the claims address only segregation within a local unit and ignore segregation among local units. Roisman & Tegeler, *supra* note 5, at 329; *see also*, Hills v. Gautreaux, 425 U.S. 284, 299-300 (1976) (stating that a housing market usually extends beyond city limits, including all areas among which dwelling units compete for residents, and analogizing communities to school districts where discriminatory practices in one create spillover effects in others).

15. To address inter-community segregation, the central city or the affected city residents must ordinarily sue the state or individual suburbs to remedy metropolitan-wide segregation. Roisman & Tegeler, *supra* note 5, at 318 (citing cases).

16. MASSEY & DENTON, *supra* note 2, at 15; Dubin, *supra* note 12, at 744, 749.

urban housing projects,¹⁷distanced from job growth and educational innovation, continues unabated.¹⁸

17. MASSEY & DENTON, *supra* note 2, at 15. Evidence continues to accrue to support the proposition that an individual living in the midst of concentrated poverty faces a decreased likelihood of ever escaping poverty. METROPOLITAN COUNCIL STAFF REPORT, HOUSING THE REGION: MOVING INTO THE 1990s, Pub. No. 450-90-003 (1990) [hereinafter HOUSING THE REGION]; GARY ORFIELD AND CAROLE ASHKINAZE, THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY, xiii-xviii (1991); Rusk, *supra* note 2, at 2; UNITED WAY OF MINNEAPOLIS, THE FACE OF THE TWIN CITIES: TRENDS AFFECTING HEALTH AND HUMAN SERVICES IN THE 90s 24 (1991) [hereinafter UNITED WAY]; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 182-83 (1987).

18. Low-income persons and persons of color increasingly find themselves restricted to housing in blighted central city areas and excluded from thriving suburban communities. MASSEY & DENTON, *supra* note 2, at 14; Dubin, *supra* note 12, at 772. Particularly in vast metropolitan areas, low-income persons and persons of color must live in areas inaccessible to commensurate jobs and good schools. Elliot D. Sclar, *Back to the City*, TECH. REV. 29, 32 (August/September 1992); WILSON, *supra* note 17, at 39, 46.

As poverty concentrates, the cost of providing traditional services at constant levels increases. Dubin, *supra* note 12, at 779. Formerly effective private and government initiatives become obsolete. Dubin, *supra* note 12, at 779; LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES, THE COSTS OF HOUSING DISCRIMINATION AND SEGREGATION: AN INTERDISCIPLINARY SOCIAL SCIENCES STATEMENT 27 (James J. Brice ed., 1986) [hereinafter LEADERSHIP COUNCIL].

Proponents of income- or class-clustering theories argue that inter-community stratification by income and race is a natural consequence of two factors: inner-city location of services that low income people use (such as mass transit or welfare distribution sites); and preference for living near family or people of the same race, income, and occupation. According to these critics, removing barriers to low-income persons' mobility would not impact residence patterns or social isolation. Peter Leyden and Sherrie Mazingo, *Where to Live? Many in Similar Jobs Like Same Metro Areas*, MINNEAPOLIS STAR TRIB., August 17, 1992, at 1A; Jean Hopfensberger, *Suit Alleges Segregation in Public Housing*, MINNEAPOLIS STAR TRIB., July 28, 1992, at 8A (quoting Sharon Sayles Belton). Yet others' empirical analysis find that residents' personal preferences alone cannot account for the high concentration of low-income persons and persons of color in the inner city. John Kasarda, *Urban Change and Minority Opportunities*, in THE NEW URBAN REALITY 33, 35 (Paul Peterson ed., 1985); John Kasarda, *Urban Industrial Transition and the Underclass*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 26 (1989) [hereinafter Kasarda (1989)]; MICKEY KAUS, THE END OF EQUALITY 120 (1992); MASSEY & DENTON, *supra* note 2, at 7; WILSON, *supra* note 17, at 49-52.

As a result, low-income people, disproportionately people of color, continue to suffer unsafe neighborhoods, lose their housing independence, and grow increasingly isolated from the society at large. James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Segregation in the U.S.*, 22 HOW. L. J. 547, 553 (1979); see also LEADERSHIP COUNCIL, *supra* note 18, at 3; WILSON, *supra* note 17, at Ch. 2.

Equipped with an array of remedies,¹⁹ but hindered by local government boundaries,²⁰ trial courts face the arduous task of integrating housing within communities that themselves consist primarily of persons of color.²¹ After long and complex litigation,²² trial courts generally order remedies that fail to reach across local boundaries.²³ These piecemeal resolutions have a negligible effect on the lives of the plaintiffs seeking fair housing²⁴ and cannot begin to resolve metropolitan-wide segregation problems.²⁵

This Note summarizes this national litigation dilemma in metropolitan housing integration and offers a realistic solution. Part I describes the foundations of fair housing law, discusses court powers to formulate remedies, and focuses on the Minneapolis/St. Paul metropolitan area as the stage for a pending housing desegregation lawsuit, *Hollman v. Kemp*.²⁶ Part II con-

19. See generally, Roisman & Tegeler, *supra* note 5, at 315 (describing variety of actions and remedies).

20. Federal courts are fundamentally restrained from actually restructuring the operations of state and local governments. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). Yet courts have formulated acceptable metropolitan-wide remedies that do not cross the line into actual restructuring. *Liddel v. Board of Ed.*, 491 F. Supp. 351, 352-59 (E.D. Mo. 1980). When regional employment and housing markets cross local boundaries, housing segregation remedies should also cross those boundaries. *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976). For a discussion of these tensions, see Comment, *Federal Housing and School Desegregation: Interdistrict Remedies Without Busing*, 25 ST. LOUIS U. L.J. 575, 576 (1981); Kushner, *supra* note 18.

21. Rusk, *supra* note 2, at 2.

22. The time from suit commencement to court order can extend to a decade, placing a difficult burden on low-income plaintiffs who will likely never benefit personally from the outcome. *E.g.*, *Gautreaux*, 425 U.S. at 284 (filed 1966, decided 1976); *Young v. Pierce*, 822 F.2d 1368 (1987) (filed 1980, decided 1987); *NAACP v. Kemp*, 721 F. Supp. 361 (1989) (filed 1980, decided 1989); *Southern Burlington NAACP v. Mount Laurel*, 336 A.2d 713 (N.J. 1975) (filed 1970, decided 1975).

23. Comment, *supra* note 20, at 601-02. On the basis of demographic evidence demonstrating egregious segregation, courts have ordered remedies which cross local boundaries. *E.g.*, *Gautreaux*, 425 U.S. at 296-300; see also, Comment, *supra* note 20, at 579 (discussing *Liddel*, 491 F. Supp. at 351).

24. Comment, *supra* note 20, at 579. Inertia within institutions implementing court orders perpetuates the status quo. *Dubin*, *supra* note 12, at 753-57; Rusk, *supra* note 2, at 2; MASSEY & DENTON, *supra* note 2, at 14.

25. *Gautreaux*, 425 U.S. at 292, 299; see also *infra* text accompanying notes 252-254 (discussing relief available under this Note's proposal).

26. *Hollman v. Kemp*, No. 4-92-712 (D. Minn. filed July 27, 1991) (complaint on file with the *Minnesota Law Review*) [hereinafter *Hollman* complaint]. Low-income housing residents have brought a class-action suit against the city of Minneapolis, federal housing authorities, and local public housing authorities. The complaint alleges that the defendants have deliberately administered public and subsidized housing programs in a manner that reinforces racially

tends that housing segregation remedies should cross local government boundaries and proposes that when a party brings a segregation lawsuit without naming the metropolitan housing authority,²⁷ a court should join the metropolitan authority²⁸ as to the appropriate claims.

II. FROM THE WAR ON POVERTY, TO CIVIL RIGHTS REMEDIES, TO THE "GREAT SILENCE"²⁹

A. FAIR HOUSING DOCTRINE

The federal government began to subsidize low-income housing in the 1930s by guaranteeing home mortgages to low-income families³⁰ and building public housing.³¹ The govern-

segregated housing patterns. The plaintiffs assert claims under the Fifth and Fourteenth Amendments to the Constitution, The Fair Housing Act of 1968, Title VI of the Civil Rights Act of 1964, 42 U.S.C. sections 1981-1983 (1992), the United States Housing Act of 1937, the Minnesota Human Rights Act, the Minneapolis Civil Rights Act, and the Equal Protection Clause of the Minnesota Constitution. They chose federal court, although state courts also had jurisdiction over all claims, because federal courts have heard many housing discrimination cases involving HUD and follow fairly settled principles with respect to its liability and its grantee agencies' responsibilities. Telephone interview with Litigation Advisory Team, Mid-Minnesota Legal Assistance (Sept. 29, 1993).

Because *Hollman* is a pending case, this Note does not discuss any additional specific strategies the plaintiffs considered. This Note suggests that other legitimate concerns might prevent plaintiffs from suing the metropolitan housing authority. For example, in complicated suits implicating a number of local government actors, plaintiffs might find that local political controversies and inter-governmental dependencies color the proceedings in state court. A corollary concern might be whether the case would present a larger issue to the state court than to the federal court. The federal court could not only apply the law with greater experience but could more easily approach the facts with fresh perspective.

27. See *infra* text accompanying notes 100-103 (discussing potential plaintiffs' reasons for failing to sue the metropolitan housing authority). These reasons generally include ignorance of the metropolitan housing authority's oversight role, fear of political consequences, and fear of retaliation. In a suit among private parties dealing at arms length, a plaintiff could expect that defendants would pursue related claims against other responsible parties as potential co-defendants. Central cities, however, have little incentive to sue the suburbs because to do so could have sweeping political and fiscal consequences for inter-community relations.

28. Under the federal rules, the court has authority to order joinder, FED. R. CIV. P. 19(a)(1), and also has supplemental jurisdiction. 28 U.S.C. § 1367 (1990); see *infra* notes 123-126 and accompanying text (extensive analysis of joinder).

29. Days, *supra* note 1, at 334-35.

30. CMAL, *supra* note 2, at 27; Rusk, *supra* note 2, at 2.

31. CMAL, *supra* note 2, at 27; Rusk, *supra* note 2, at 2.

ment greatly expanded these efforts³² during the War on Poverty campaign of the Great Society era.³³ The 1964³⁴ and 1968³⁵ civil rights acts codified fair housing principles and established standards for finding violations.³⁶ Title VI³⁷ and Title VIII,³⁸ along with the Fifth and Fourteenth amendments to the Constitution, provide the primary bases for liability arising from residential segregation and discrimination.³⁹ In 1968, the U.S. Supreme Court applied the civil rights acts to outlaw discrimination in all public and private housing,⁴⁰ causing a dramatic reform in federal housing administration away from de jure segregation⁴¹ of people of color in publicly funded housing.⁴² Enforcement, however, rested entirely on private lawsuits.⁴³ In

32. Despite programs designed to remedy the problem, millions of low-income Americans cannot obtain basic housing. NENNO, *supra* note 2, at 261 (citing a Harvard study, William C. Apgar & H. James Brown, *The State of the Nation's Housing* (1988)). State, federal, and local government programs attempt to correct the housing market failure by providing affordable housing. FORSBERG ET AL., *supra* note 2, at 27, 28. For a brief summary of government housing interventions since the 1950s, see Ernest Erber, *Metropolitan Housing Allocation Planning*, URBAN LAND 8 (April 1974). For a thorough review of federal programs, see Fred Fuchs, *Introduction to HUD Conventional Public Housing, Section 8 Existing Housing, Voucher, and Subsidized Housing Programs*, Parts 1-2, 25 CLEARINGHOUSE REV. 782-92, 990-1000 (1991). The most common types of public housing are publicly-owned housing projects in which every resident meets low-income or poverty-level criteria, publicly-owned individual units which are not located near other publicly-owned units (known as scattered-site public housing), and housing vouchers given directly to low-income residents to subsidize their rent in privately-owned housing. CMAL, *supra* note 2, at 27.

33. CMAL, *supra* note 2, at 27; RUSK, *supra* note 2, at 2; *see also*, CHARLES M. LAMB, FAIR HOUSING IMPLEMENTATION FROM NIXON TO REAGAN (1992) (describing policies and actual changes in fair housing under several administrations); EJIKEME M. OGOKO, A COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF "FAIR HOUSING," TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 UNDER THE CARTER AND REAGAN ADMINISTRATIONS (1976-1984) (1988) (discussing aftermath of the Great Society Programs with respect to housing).

34. Title VI, 42 U.S.C. § 2000d (1990).

35. Title VIII, *as amended*, 42 U.S.C. § 3601 (1990).

36. Roisman & Tegeler, *supra* note 5, at 317; Dubin, *supra* note 12, at 782; MASSEY & DENTON, *supra* note 2, at 14.

37. Title VI, 42 U.S.C. § 2000d.

38. Title VIII, 42 U.S.C. § 3601.

39. Roisman & Tegeler, *supra* note 5, at 314 (citing cases).

40. *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968) (holding that the Fair Housing Act bars discrimination in sale or lease of housing, both public and private).

41. CMAL, *supra* note 2, at 27.

42. *Id.*

43. Several commentators suggest that because the Fair Housing Act relied primarily upon private enforcement, it was necessarily weak and largely unenforced. CMAL, *supra* note 2, at 27; MASSEY & DENTON, *supra* note 2, at 14.

1988, having determined that private enforcement alone had proven insufficient,⁴⁴ Congress enacted The Fair Housing Amendments Act of 1988, which gave the U.S. Department of Housing and Urban Development (HUD)⁴⁵ authority to penalize those who discriminate in housing sales or rentals.⁴⁶

1. Defining Fair Housing

The civil rights acts and cases interpreting them define legally fair housing as housing free of both intended⁴⁷ and effective⁴⁸ racial discrimination.⁴⁹ For decades after the Supreme Court condemned intentional segregation, public housing authorities tended to allocate or build new publicly funded housing in proximity to existing projects,⁵⁰ many of which were originally intentionally segregated. This practice resulted in dramatic, effective segregation.⁵¹ Few recent plaintiffs argue

44. MASSEY & DENTON, *supra* note 2, at 14; ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §§ 5.1, 10.4 (1) (1990). Plaintiffs have brought no more than fifty cases annually. LEADERSHIP COUNCIL, *supra* note 18, at 3. Private enforcement is problematic because plaintiffs often fail to survive standing challenges. In general, to obtain standing the plaintiff must demonstrate not only a "distinct and palpable injury," but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 60 (1978). In the zoning context, the Court denied standing to Rochester, New York, residents who sued a suburb for exclusionary zoning against low-income persons. *Warth v. Seldin*, 422 U.S. 490, 492 (1975). Plaintiffs failed to demonstrate that absent the restrictive zoning, a substantial probability existed that plaintiffs would have been able to procure housing in the suburb. *Id.* Rochester taxpayers making an argument that the suburb's failure to provide low-income housing increased the Rochester tax burden also failed the standing test. *Id.*

Moreover, plaintiffs continue to bear a difficult burden of proof for fair housing violations. Dubin, *supra* note 12, at 485. While they no longer need to demonstrate intentional discrimination, courts of appeals have split with respect to what comprises the elements of proof. *Id.* at 785 n.217 and accompanying text.

45. For a thorough discussion of HUD's creation and programs, see Fuchs, *supra* note 32.

46. CMAL, *supra* note 2, at 27.

47. De jure segregation is government approved discrimination. Roisman & Tegeler, *supra* note 5, at 317. Intentional discrimination is discrimination using race as at least one criteria for decision making. *Id.*

48. De facto or effective segregation results from behavior which, absent proof of intent to discriminate on the basis of race, tends to foster segregation. *Id.*; Dubin, *supra* note 12, at 784-85.

49. Karl Tauber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 346-47 (1988); Roisman & Tegeler, *supra* note 5, at 313-14.

50. LEADERSHIP COUNCIL, *supra* note 18, at 1-2; Dubin, *supra* note 12, at 752-53, 773; Comment, *supra* note 20, at 582, 586.

51. MASSEY & DENTON, *supra* note 2, at 15; Kushner, *supra* note 18, at 594.

intentional segregation,⁵² yet poverty, race, and residence in substandard housing continue to highly correlate.⁵³ Effective racial segregation can result from discrimination based on factors such as income, number of children, or public assistance status.⁵⁴ Given the socio-economic inequalities that persist in our society, as poverty concentrates,⁵⁵ so does race.⁵⁶ Federal

52. Telephone interview with Litigation Advisory Team, *supra* note 26.

53. MASSEY & DENTON, *supra* note 2, at 150 (citing empirical work); Rusk, *supra* note 2, at 2.

54. Roisman & Tegeler, *supra* note 5, at 320.

55. The U.S. Census defined the 1988 poverty level as \$12,092 per year for a four person household, and \$6,024 per year for a one person household. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 423 (1990).

Poverty tends to concentrate in particular neighborhoods. CMAL, *supra* note 2, at 27. When some communities exclude affordable housing, poverty concentrates in those communities that do permit affordable housing. U.S. BUREAU OF THE CENSUS, *supra*, at 442-43, Table 715. Persons with incomes below the poverty line typically must spend from 45 percent to 60 percent of their income on market-priced rent. *Id.* at 442-43, Table 714. After accounting for household expenses beyond rent, the percentages worsen for people in poverty:

<u>Income Quintiles Before Taxes</u>	<u>% Spent On Shelter</u>	<u>% Spent On Total Housing</u>
All groups	14.9%	27.4%
Lowest 20% (\$4,611)	45.6%	82.9%
Second 20% (\$11,954)	23.0%	42.7%
Third 20% (\$20,943)	16.6%	30.9%
Fourth 20% (\$33,276)	13.7%	25.6%
Highest 20% (\$65,750)	11.3%	20.5%

Id. According to HUD, which administers national housing initiatives, a household should spend no more than 30% of its gross income on housing. Memorandum from Kathy Novak, Legislative Analyst, to Minnesota State Representative Myron Orfield 3-4 (November 5, 1992) (on file with the Minnesota House of Representatives, House Research Department). Applying the HUD 30% standard to Minnesota, one person and four person households in Minneapolis-St. Paul earning median incomes should spend approximately \$892 per month and \$1276 per month respectively on housing. Households grossing \$10,710 for one person or \$15,300 for four persons—defined as low income because their income is 30% of area median income for that household size—should pay no more than \$268 per month and \$382 per month respectively. *Id.* Yet, in Minneapolis, studio apartments average \$313 per month, one-bedrooms \$381 per month, and two-bedrooms \$494 per month. MINNEAPOLIS CITY PLANNING DEPARTMENT, MINNEAPOLIS HOUSING UPDATE: MID-YEAR 1990, at 2. The average rent for a Minneapolis apartment across all sizes was \$392 at mid-year. *Id.* In 1990, the Twin Cities housing cost of living index was 112.3 compared to a 100 point national average. U.S. BUREAU OF THE CENSUS, A STATISTICAL ABSTRACT SUPPLEMENT: STATE AND METROPOLITAN AREA DATA BOOK 1991, at 33, Table A.

The median income for Twin Cities renters is nearly half that of homeowners. METROPOLITAN COUNCIL OF THE TWIN CITIES, MEETING THE REGION'S HOUSING NEEDS IN THE 1990'S: A THREE-PART PROPOSAL, 18 Pub. No. 450-91-029 (1991) [hereinafter MEETING THE REGION'S HOUSING NEEDS]. Renters are be-

fair housing law evolved in response to overt racial segregation in housing but for many years did not address the persistent link between poverty and race.⁵⁷ Today, courts and legislatures largely agree that public entities do not fulfill their fair housing obligations merely by eradicating intentional segregation.⁵⁸ Many courts have interpreted the Constitution and Title VIII to impose an obligation⁵⁹ on responsible government agencies⁶⁰

coming increasingly poor and paying disproportionate income percentages on housing. *Id.* These households sacrifice more to keep their housing, and must stretch the remaining resources further to pay for food, utilities, transportation, and other needs. Nearly 9% of all renter households had incomes under \$8,000 and paid over 50% of their income for rent. *Id.*

56. Although race and poverty tend to concentrate within the same neighborhoods, income alone cannot explain residence in segregated neighborhoods. MASSEY & DENTON, *supra* note 2, at 12; WILSON, *supra* note 17, at Ch. 2. For example, in 1990, the Minneapolis population consisted of 22 percent persons of color, 30 to 40 percent of whom lived below the poverty line. UNITED WAY, *supra* note 17, at 15, 23. Minority residents frequently express a desire to move to safer neighborhoods in which their children will face greater opportunities and fewer dangers. Several comprehensive studies conducted by James Rosenbaum conclude that integrated neighborhoods result in healthier, more successful outcomes for all persons, although difficult transition periods of one year or longer may occur. *E.g.*, James E. Rosenbaum and Susan Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs*, in THE URBAN UNDERCLASS 342 (Christopher Jenks and Paul E. Peterson eds., 1991); James E. Rosenbaum et al., *Low-Income Black Children in White Suburban Schools: A Study of School and Student Responses*, 56:1 J. NEGRO EDUC. 35 (1987); James E. Rosenbaum et al., *Social Integration of Low-Income Black Adults in Middle-Class White Suburbs*, 38:4 SOC. PROBS., (1991); James E. Rosenbaum et al., *White Suburban Schools' Responses to Low-Income Black Children: Sources of Successes and Problems*, 20:1 URB. REV. 28 (1988). The findings also confirm that scattered-site subsidized housing, in which low-income households receive a housing voucher for use anywhere in the metropolitan housing market, provides better quality of life than concentrated projects do for people living in poverty. In addition, scattered-site housing widely distributes costs associated with special services needed by these persons. "The [Twin Cities Metropolitan] Council believes that a balanced distribution of housing for all income levels throughout the region is best. It promotes diversity, provides good role models and learning experiences for children, and prevents the concentration and multiplication of crime and other social problems often associated with poverty." METROPOLITAN COUNCIL STAFF REPORT, HOUSING THE REGION: MOVING INTO THE 1990S, 11 Pub. No. 450-90-003 (March 1990). Yet minorities' repeated attempts to seek affordable housing outside the inner-city continue to fail. *Hollman v. Kemp*, No. 4-92-712, 4-11 (D. Minn. filed July 27, 1991) (complaint on file with the *Minnesota Law Review*); MASSEY & DENTON, *supra* note 2, at 12; Jean Hopfensberger, *Suit Alleges Segregation in Public Housing*, MINNEAPOLIS STAR TRIB., July 23, 1992, at A1.

57. Roisman & Tegeler, *supra* note 5, at 312, 343.

58. Comment, *supra* note 20, at 581-87.

59. Title VIII imposes this obligation through express language. Roisman & Tegeler, *supra* note 5, at 325-27 (citing statutory language and discussing NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987)

and other participants in housing and community development programs⁶¹—such as state and local PHA's—to act affirmatively to promote integration.⁶² To an extent, the duty to promote fair housing follows the federal dollars as they disperse throughout publicly funded housing initiatives.⁶³ Because low-income housing shortages often result in racial segregation, some states have taken a further step to address directly discrimination against low-income persons. This approach, however, remains the exception.⁶⁴

and *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 841 (N.D. Ohio 1989)). Courts also read implied duties into Title VIII. *Roisman & Tegeler, supra* note 5, at 327-28 (discussing *Bazemore v. Friday*, 478 U.S. 385, 395 (1986)).

60. *Shannon v. HUD*, 436 F.2d 809, 816 (3d Cir. 1970).

61. Housing and Community Development Act of 1974, Pub. L. No. 93-282, 88 Stat. 633 (codified at 42 U.S.C. § 5304(b)(2) (1988)); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973); 24 C.F.R. § 570.601(b) (1993).

62. 24 C.F.R. § 570.904, which defines criteria for receipt of CDBG funds, enumerates a number of actions that fulfill the "affirmatively furthering fair housing" standard. In general, this standard requires race-conscious action to cure past discrimination and segregation "to the point where the supply of genuinely open housing increases." *Roisman & Tegeler, supra* note 5, at 326 (citing *NAACP, Boston Chapter v. Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987)).

63. All federal agencies and executive departments must affirmatively administer housing programs and activities to promote fair housing. Title VIII, *as amended*, 42 U.S.C. § 3608(d) (1990). *See Shannon v. HUD*, 436 F.2d at 816. A claim based on HUD's unconstitutional behavior can succeed due to HUD's discriminatory action, failure to affirmatively provide fair housing, knowledge of grantee PHA's discriminatory action, or failure to properly oversee those PHA's which it funds. *Roisman & Tegeler, supra* note 5, at 325-30. In addition, courts have held that private parties receiving federal money to supply low-income housing must not practice discrimination. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1990).

64. *Tauber, supra* note 49, at 346-47 (1988); *Roisman & Tegeler, supra* note 5, at 343, 344 (citing, e.g., N.J. Stat. Ann. §§ 52:27D - 301 (West 1992) (effective Jan. 1, 1986); *Oakwood at Madison, Inc. v. Town of Madison*, 371 A.2d 1192 (N.J. 1977); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924) *rev'd by Village of Euclid v. Ambler*, 272 U.S. 365, 390, 395 (1926)); *see also Suffolk Hous. Servs. v. Town of Brookhaven*, 511 N.E.2d 67, 69 (N.Y. 1987) (denying challenge to town's refusal to participate in government program promoting low- and moderate-income housing, upholding the particular zoning use, but stating "implicit in our rulings is a recognition of the principle that a municipality may not legitimately exercise its zoning power to effectuate socio-economic or racial discrimination").

2. Allocating and Reviewing the Duty to Assure Fair Housing Among Federal, State, and Local Actors: A Source of Confusion

Because federal, state, and local officials oversee housing programs differently from locality to locality, plaintiffs and courts face a formidable task in determining whether each actor has fulfilled its fair housing duty under the appropriate standard.⁶⁵ HUD funds most housing programs and must guarantee, under Title VIII's express language, that grantees affirmatively administer the programs to further fair housing.⁶⁶ Although state and local PHA's are created by state statute and are locally governed, they receive most funding from federal sources, including HUD.⁶⁷ When acting as federal grantees,⁶⁸ these PHA's must meet "affirmative duty" administration standards.⁶⁹ State legislatures, however, sometimes provide additional public funding for housing.⁷⁰ When funding low-income housing, state legislatures must abide by federal and state civil rights laws. When administering only state funding, PHA's may not have to meet the federal affirmative duty standard.⁷¹

After a plaintiff has decided to sue a particular agency for failing to fulfill its fair housing duty, the court must examine that agency's action by applying both fair housing and administrative law principles. The standard of review under pure administrative law differs significantly from that applied in fair housing cases, so the court's choice with respect to which line of cases to follow may affect the case's ultimate resolution.⁷²

The Administrative Procedures Act (APA) dictates the extent to which a court may scrutinize agency decisions and de-

65. Comment, *supra* note 20, at 592; Roisman & Tegeler, *supra* note 5, at 313, 314, 328.

66. Comment, *supra* note 20, at 589.

67. Roisman & Tegeler, *supra* note 5, at 340, 341.

68. "Federal funding" subject to these standards includes HUD funds and CDBG funds. When HUD or CDBG grants do not fund a PHA, however, HUD can do nothing to assure that agency's compliance. Comment, *supra* note 20, at 602.

69. Comment, *supra* note 20, at 594.

70. Roisman & Tegeler, *supra* note 5, at 318.

71. *Id.*

72. Most administrative precedents focus on federal agency liability. Relatively few cases have been brought against metropolitan-level state agencies. Telephone Interview with Council of Large Public Housing Authorities, *supra* note 8.

finer "agency action" to include "failure to act."⁷³ The Supreme Court, however, recently reinforced its policy of deference to an agency when reviewing administrative inaction.⁷⁴ In reviewing agency inaction outside the housing context, a court must defer to administrative discretion and decision making ability. An agency's refusal to initiate enforcement proceedings is "presumptively unreviewable."⁷⁵ When a legislature establishes specific guidelines for enforcement decisions, however, a court may determine whether the agency followed the statutory guidelines.⁷⁶ Long-standing patterns of enforcement followed by sudden, unexplained non-enforcement may subject the agency to a higher level of judicial scrutiny.⁷⁷ A more intrusive review standard may apply to agency determinations having constitutional implications.⁷⁸ At least two states have taken the position that when an agency possesses the authority to adopt rules, those rules have the full force of law as if mandated by statute.⁷⁹

Because fair housing cases involve fundamental constitutional and civil rights, courts have more discretion even absent a clear exception to presumptive unreviewability. When a federal

73. Administrative Procedure Act, 5 U.S.C. § 551(13) (1992) [hereinafter APA]. In particular, APA section 706 expressly requires a court's review when an agency has unlawfully withheld action. *Id.* at § 706.

74. Heckler v. Chaney, 470 U.S. 821 (1985) (analogizing FDA officer discretion to criminal justice prosecutorial discretion and emphasizing practical difficulties in reviewing exercise of managerial judgment broadly conferred).

75. *Id.* at 831.

76. Dunlop v. Bachowski, 421 U.S. 560, 568 (1975) (holding Secretary of Labor's refusal to challenge union election reviewable because governing statute required Secretary to bring suit if he found probable cause that election rules violation occurred); see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

77. Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) (stating that a presumption exists that the policies committed to an agency by Congress will be best served if a settled rule is followed and that, consequently, an agency has a duty to at least explain its departure from prior norms); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) (requiring agency to comply with its own rules or explain non-compliance even though it voluntarily adopted the rule).

78. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53 (1936) (requiring de novo review of constitutional facts).

79. Wilkins v. Perales, 487 N.Y.S.2d 961, 964 (N.Y. Sup. Ct. 1985) (holding that an agency is bound by its own regulations: plaintiffs complained that agency decision not to enforce its own regulation violated their constitutional rights); Duflo Spray-Chemical, Inc. v. Jorling, 153 A.D.2d 244 (N.Y. App. Div. 1990) (holding agency bound by language of its own regulation and prohibited from construing it in such a manner as to render the plain language meaningless); Harsh Invest. Corp. v. State Hous. Div., 744 P.2d 588, 591 (Or. App. 1987) (restating holding in Bronson v. Moonen, 528 P.2d 82 (Or. 1974)).

housing authority such as HUD violates its own regulations⁸⁰ or engages in a pattern of inaction in contravention of its statutory mandate, such action is subject to review under the APA.⁸¹ In cases reviewing metropolitan agency actions outside housing, courts have followed administrative law precedents calling for shallow review.⁸² In fair housing cases involving state and local PHA's, many courts analogize state and local PHA's to HUD for reviewability purposes.⁸³ If, however, a plaintiff sues a state or local PHA in a court inexperienced in fair housing law, that court might follow traditional administrative law principles and consider the agency's action presumptively unreviewable.⁸⁴ For instance, the court might not examine the record to determine whether the agency satisfied applicable civil rights laws.⁸⁵

Another theory allows courts to review state and local housing authority actions involving civil rights claims. Absent both a clear exception to the presumptively unreviewable standard and an analogous-to-HUD argument, one federal court reviewed not only HUD's action or inaction, but also the metropolitan housing authority's enforcement patterns.⁸⁶ The court reasoned that because the metropolitan agency acted as a pass-through agency for HUD policies, the court should review the agency's activities as it would review HUD's activities.⁸⁷ Recently, some courts have suggested that Title VIII carries implied obligations to eliminate, compensate for, and overcome prior substantive inequality, and using this reasoning, have held state PHA's to the higher reviewability standard imposed on HUD.⁸⁸

Plaintiffs seeking an effective remedy for metropolitan-wide segregation face a deeper problem than either the lack of uniform duty among housing funders and administrators or judicial reviewability. HUD and state and local PHA's can plan housing and allocate public funding but cannot control zoning boards in-

80. See Harsh, 744 P.2d at 594 (extending this reasoning to state agencies).

81. NAACP v. Kemp, 721 F. Supp. 361, 364 (D. Mass. 1989).

82. See, e.g., Metropolitan Gov't of Nashville v. Shacklett, 554 S.W.2d 601, 603-04 (Tenn. 1977).

83. *Id.*; Roisman & Tegeler, *supra* note 5, at 320.

84. See Heckler v. Chaney, 470 U.S. 821, 831 (1985); *supra* notes 74-75 and accompanying text.

85. Cf. Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203, 1209 (6th Cir. 1987); *infra* note 86 and accompanying text.

86. In Jaimes v. Lucas Metro. Hous. Auth., the court reviewed both Lucas Metropolitan Housing Authority and HUD actions and inactions. *Jaimes*, 833 F.2d at 1209.

87. Jaimes v. Toledo Metro. Hous. Auth., 715 F. Supp. 835, 837 (N.D. Ohio 1989).

88. Roisman & Tegeler, *supra* note 5, at 327.

side or outside a community,⁸⁹ so they must work within the constraints of exclusionary zoning.⁹⁰ At minimum, PHA's must inform clients that they can apply certain types of federal subsidies to housing anywhere.⁹¹ Yet, even if the PHA does everything within its power to fairly distribute persons throughout its jurisdiction, dramatic metropolitan-wide segregation can result because factors beyond the PHA's control may render housing outside its jurisdiction unavailable to low-income persons.⁹²

3. Sharing the Duty with Metropolitan Government

Several state legislatures addressed the problem of piecemeal services by creating agencies responsible for coordinating public services throughout their metropolitan areas.⁹³ Seen as locally sensitive administrations accountable to the entire state,⁹⁴ some of these agencies received legislative mandates to oversee publicly funded housing.⁹⁵ When these metropolitan agencies fail in their fair housing mission,⁹⁶ the publicly funded housing market again fragments,⁹⁷ segregation increases,⁹⁸ and frustrated plaintiffs can be expected in court. If these plaintiffs do not name their metropolitan housing authority as a defend-

89. Dubin, *supra* note 12, at 769.

90. *Id.* at 756; *see, e.g.*, MINN. STAT. § 473.859, subd. 4(c) (1992) (requiring that local government units provide comprehensive housing plans regarding low and moderate income housing as part of land use planning process, but stating in subdivision one that if in conflict with local zoning ordinances, zoning trumps obligation to metropolitan area fair share goals).

91. Roisman & Tegeler, *supra* note 5, at 326.

92. *Id.*; Dubin, *supra* note 12, at 755, 756.

93. Across the nation, states with large metropolitan areas are choosing the metropolitan government model for distributing and administering particular services such as public works, transportation, and subsidized housing while retaining autonomous city and local governments for all other functions. In particular, Minneapolis-St. Paul, Minnesota; Portland, Oregon; Washington D.C.; Denver, Colorado; Toledo, Ohio; Lorain, Ohio; Miami Valley Region, Ohio; San Bernadino County, California; and Delaware Valley Region, Delaware, established active metropolitan agencies which oversee housing and land-use planning. Telephone Interview with Research Department, Metropolitan Council (October 1, 1993); ARTHUR NAFTALIN, MAKING ONE COMMUNITY OUT OF MANY: PERSPECTIVES ON THE METROPOLITAN COUNCIL OF THE TWIN CITIES AREA 5, 8 (1986).

94. *See* NAFTALIN, *supra* note 93, at 16, 17.

95. *See* NAFTALIN, *supra* note 93, at 16, 73.

96. These metropolitan governments face or participate in the legacy of racial segregation practiced by other levels of government. Dubin, *supra* note 12, at 753-54. Courts deciding housing segregation suits will be asked to formulate remedies in increasingly complex settings.

97. Rusk, *supra* note 2, at 2; NAFTALIN, *supra* note 93, at 8, 16.

98. Rusk, *supra* note 2, at 3.

ant in the litigation,⁹⁹ the court cannot accord complete relief, particularly to all class members in a class action suit, because the existing defendants cannot remedy inter-community segregation.¹⁰⁰

Plaintiffs may not sue the metropolitan housing authority of their own volition for several reasons. First, the complex housing administration scheme can lead plaintiffs to overlook the actor best positioned to perpetuate and remedy segregation—the metropolitan housing authority—and enter lawsuits unlikely to yield effective remedies because they take an unduly narrow approach to causation.¹⁰¹ For example, a community which harbors concentrated poverty and disproportionate numbers of minorities may seem a logical target for litigation and corrective action. That community may have openly contributed to segregation in the past, but it is probably not the primary discriminatory actor today: it cannot force other communities to make housing available.¹⁰² At the complaint stage, the plaintiffs may not realize the crucial role the metropolitan housing authority plays in inter-community segregation: the local PHA is clearly implicated, HUD has become a matter-of-course defendant in fair housing suits, and federal courts have experience dealing with both, but the metropolitan housing authority is the invisible intermediary.¹⁰³ Because the metropolitan authority often administers programs on which plaintiffs depend, to expect plaintiffs to voluntarily sue the metropolitan authority is to expect them to bite the hand that houses or will house them.¹⁰⁴ If plaintiffs sue their housing project and fear retaliation from that project, they can foresee moving to another project; the metropolitan housing authority, which sets metropolitan-wide policies, would be harder to “escape.” Whether well-founded or not, this concern could cause plaintiffs to hesitate before initiating a suit against the metropolitan authority. Likewise, defendants already involved in the suit who politically and economically depend on and cooperate with the metropolitan authority might be reluctant to initiate an adversarial relationship with it. Thus,

99. See *supra* note 26; Interview with Rep. Myron Orfield, Minn. H. Rep. (Oct. 11, 1992); Interview with Hollman Litigation Advisory Team from Mid-Minnesota Legal Assistance (Oct. 12, 1992).

100. Roisman & Tegeler, *supra* note 5, at 338.

101. Roisman & Tegeler, *supra* note 5, at 328 (contrasting lawsuits brought to correct specific injustices with lawsuits brought to address systemic discrimination).

102. Rusk, *supra* note 2, at 3.

103. *Supra* note 99 (interviews); see also *supra* note 26.

104. *Supra* note 99 (interviews).

although courts cannot accord plaintiffs as a class with complete relief absent metropolitan housing authorities, suits will continue to commence in their absence.

B. A COURT'S POWER TO REMEDY SEGREGATION IN PUBLICLY FUNDED HOUSING

1. Recognizing a Metropolitan-Wide Problem

Several major principles have emerged regarding courts' powers to provide metropolitan-wide remedies for fair housing violations stemming from segregation or the failure to promote fair housing.¹⁰⁵ If a court finds that defendants' behavior in any way fostered effective segregation,¹⁰⁶ it may impose a metropolitan-wide remedy to correct the relevant housing market.¹⁰⁷ Severe effective segregation, even absent proof of intentional segregation or "fostering behavior," may be sufficient to permit a court to impose a metropolitan-wide remedy.¹⁰⁸ Title VIII prohibits discrimination in public housing and creates an affirmative duty for federal agencies, like HUD, to administer all activities in furtherance of the Act's fair housing policy.¹⁰⁹ When a public housing authority violates its affirmative duty to further the Act's policy, federal courts possess broad power to fashion a remedy.¹¹⁰

105. If a court does find *de jure* segregation or a constitutional violation, it may order corrective action beyond the local boundaries within which the violation occurred if the relevant housing market extends beyond the local limits. *Hills v. Gautreaux*, 425 U.S. 284, 299-300 (1976); *NAACP v. Kemp*, 721 F. Supp. 361, 366 (D. Mass. 1989).

106. *Roisman & Tegeler*, *supra* note 5, at 317-18 (discussing behavior fostering segregative effect).

107. For a comprehensive overview of remedies, see *Roisman & Tegeler*, *supra* note 5, at 328, 337-42. Courts have not only awarded damages and granted injunctions but have given specific directives: rezoning, invalidating exclusionary zoning, requiring that violators establish fair housing authorities and/or funds and administer them affirmatively to correct segregation, or ordering that individuals be moved to desegregated neighborhoods at public cost. *Id.*

108. See *Gautreaux*, 425 U.S. at 305-06.

109. *Id.* at 302. Pursuant to 24 C.F.R. § 570.905, all recipients of Community Development Block Grants (CDBG) must agree to administer all housing-related activities to further fair housing policy. *Dubin*, *supra* note 12, at 790.

110. The *Gautreaux* Court also held that granting metropolitan area relief did not constitute impermissible interference which would "consolidate or in any way restructure local government units. . . [because it] would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws." *Gautreaux*, 425 U.S. at 305-06. Once a court establishes liability, it is not limited to ordering HUD "to perform acts which would be required of it even absent a finding of past culpability."

Two categories of judicial remedies have emerged from legal developments in this area: court-ordered governmental agency action and court-ordered community action. In the paradigm case of the former category, *Hills v. Gautreaux*,¹¹¹ the Supreme Court ordered HUD to create housing alternatives for low-income persons of color in the Chicago suburbs,¹¹² even though suburbs had not engaged in unconstitutional behavior or fostered the effective segregation.¹¹³ The *Gautreaux* decision greatly impacted subsequent fair housing cases by extending the definition of the relevant housing market to cover the surrounding suburbs.¹¹⁴ The Court recognized that only a broad, flexible, practical, and metropolitan-wide remedy would suffice.¹¹⁵ In dealing with remedies involving remedial community action, *Southern Burlington County NAACP v. Township of Mount Lau-*

NAACP v. Kemp, 721 F. Supp. 361, 367 (D. Mass. 1989). Furthermore, if the court does find any discriminatory housing practice, the Fair Housing Act expressly provides that a district court may grant "any . . . affirmative action as may be appropriate." 42 U.S.C. § 3613(c) (1992).

When an agency "knowingly created, promoted, and funded racially segregated housing," courts have fashioned highly invasive solutions, sometimes directly involving persons not parties to the suit. *Gautreaux*, 425 U.S. at 299 (ordering the Chicago Housing Authority and HUD to create housing alternatives for low-income residents in the suburbs); *United States v. City of Yonkers*, 856 F.2d 444, 447 (2d Cir. 1988) (entering remedial consent decree elaborating long-term framework for city to provide desegregated, low-income housing plan), *rev'd in part sub nom.*, *Spallone v. United States*, 493 U.S. 265 (1990); *Walker v. HUD*, 734 F. Supp. 1289, 1290 (N.D. Tex. 1989) (developing and extending consent decree requiring new tenant selection and assignment plan, establishing a housing mobility division, providing one-for-one replacement if any subsidized units scheduled for demolition); *Young v. Pierce*, 640 F. Supp. 1476, 1479 (E.D. Tex. 1986) (requiring 25 households from a white project to trade apartments with 25 households from black projects), *rev'd on other grounds* by 822 F.2d 1368 (5th Cir. 1987); *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985) (requiring new construction, extensive rehabilitation, and improved services, specifying means by which local officials would finance remedy), *aff'd in pertinent part*, 807 F.2d 657 (8th Cir. 1986), *aff'd on other grounds* by, 495 U.S. 33 (1990).

111. See *Gautreaux*, 425 U.S. at 296.

112. The Court based its decision on effective segregation within Chicago itself, HUD's unconstitutional behavior, and HUD's authority to act beyond the Chicago city limits. *Id.*

113. Following the decision, the district court ordered that HUD move several thousand very low-income minority families to the white suburbs, where most flourished, even though they received no special assistance of any kind beyond the change of location and the housing subsidy itself. Roisman & Tegeler, *supra* note 5, at 330-31.

114. *Gautreaux*, 425 U.S. at 296; see *supra* notes 14-15.

115. See *Gautreaux*, 425 U.S. at 297.

*rel*¹¹⁶ proved to be the high water mark in this area. The New Jersey Supreme Court held that a developing municipality in a metropolitan area may not physically and economically exclude low and moderate income housing. The court remedied the situation with a detailed and invasive desegregation plan.¹¹⁷ Few state courts have followed *Mount Laurel's* activist lead.¹¹⁸

Even these highly invasive remedies have limits. Some courts ruling on school district funding and desegregation cases have decided against imposing metropolitan-wide remedies,¹¹⁹ but these cases are easily distinguished from effective segregation in housing cases.¹²⁰ Courts in these cases respected the limits on judicial power to actually restructure local governmental units such as school districts or tax bases.¹²¹ Imposing a metropolitan-wide housing desegregation order against HUD or PHA's would not require local government restructuring because it would effect change through incentives and program in-

116. *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

117. The *Mount Laurel* court based its holding on the New Jersey constitution, which expressly reserved land-use regulation to the state legislature, and applied state due process and equal protection clauses, broader than the federal clauses.

Furthermore, community regulations must affirmatively provide housing opportunities for low and moderate income persons up to its "fair share" of the regional need. *Mount Laurel*, 336 A.2d at 724, 725. Since *Mount Laurel*, the requirement that all communities in a region provide decent, low-income housing in proportion to their population and rate of development has been dubbed "fair share" policy, although specific policies vary in specificity, numerical goals formulas, and assessed penalties.

118. *Roisman & Tegeler*, *supra* note 5, at 349, 354 (noting that similar approaches appeared only in Pennsylvania, New York, Connecticut, and New Hampshire).

119. In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court rejected a constitutional attack on a local public education financing system based on community wealth. *Id.* at 16. The Court concluded that discrimination on the basis of wealth is not subject to strict scrutiny, but only to rational basis scrutiny. *Id.* at 29. On that basis, the Court rejected plaintiffs' request for a metropolitan-wide restructuring of school financing. In *Milliken v. Bradley*, the Court, stating that federal courts are fundamentally restrained from actually restructuring the operations of state and local governments, again refused to formulate the requested metropolitan remedy which would have consolidated a number of school districts. *Milliken v. Bradley*, 418 U.S. 717, 740-42 (1974). Fair housing cases in which courts order a metropolitan entity to remedy segregation do not require a fundamental restructuring of local government.

120. Comment, *supra* note 20, at 587.

121. *Id.*

novation rather than through restrictions on local government decision making.¹²²

2. Ordering Desirable Parties to Join if Feasible

When a civil lawsuit commences without a party in whose absence the court cannot accord complete relief, the court possesses the power to order that person to join the suit as to the appropriate claims.¹²³ A court ordering joinder under these circumstances does not engage in judicial activism. To the contrary, the Federal Rules of Civil Procedure require such joinder.¹²⁴ When egregious segregation results from intra-community and inter-community actions, a court cannot accord complete relief without addressing both causes in its desegregation order.¹²⁵

In fair housing cases, aside from the need to accord complete relief, several policy considerations compel court-ordered joinder. The interests of judicial economy¹²⁶ favor joinder, because the complex administrative scheme may lead to cross-claims, counter-claims, party dismissal, or multiple lawsuits liti-

122. *E.g.*, *Jaimes v. Lucas Metro. Hous. Auth.*, 833 F.2d 1203, 1205-06 (6th Cir. 1987).

123. FED. R. CIV. P. 19(a)(1). The rule serves three classes of interests: the present parties' interests, the potential but absent parties' interests, and society's interest in the "orderly, expeditious administration of justice." *Tankersley v. Albright*, 514 F.2d 956, 965 (7th Cir. 1975) (articulating the need to balance these interests). The rule seeks to avoid unnecessary, multiple litigation, to provide the parties with complete relief, and to protect the absent parties rights and interests. *CBS, Inc. v. Film Corp. of Am.*, 545 F. Supp. 1382, 1388 (E.D. Penn. 1982) (balancing classes of interests to determine if additional party to creditors' action should be joined). The current version of the rule eliminates the need to distinguish between necessary and indispensable parties by providing a balancing test by which a court determines whether it should order an absent party to join. *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885, 888-89 (5th Cir. 1968) (describing effect of current joinder rules); *JTG of Nashville, Inc. v. Rhythm Band, Inc.*, 693 F. Supp. 623, 627 (M.D. Tenn. 1988) (favoring joinder over dismissal of claim). When it is possible to join an absent necessary party, dismissal is not proper and the court should order that party to join. *International Union of Operating Engineers, Local 103 v. Irmscher & Sons, Inc.*, 63 F.R.D. 394, 397 (N.D. Ind. 1973) (explaining that policy behind joinder, to avoid dismissal of parties whenever possible, is consistent with justice).

124. Rule 19(a) states "If the person [in whose absence the court cannot accord complete relief] has not been so joined, the court *shall* order that the person be made a party." FED. R. CIV. P. 19 (a)(1) (emphasis added).

125. *See CBS, Inc.*, 545 F. Supp. at 1388-89 (stating that court must order joinder to accord complete relief among parties).

126. *See supra* note 123 (cited cases).

gating the same issues.¹²⁷ Court-ordered joinder will also help inform subsequent plaintiffs of the metropolitan housing authority's role in their housing market. Finally, when the court orders joinder under these circumstances, it can reduce the plaintiffs' fear of retaliation arising from their economic and political dependence on the previously absent party.

C. A MICROCOSM OF THE NATIONAL DEBATE: THE MINNESOTA RESPONSE

This Note uses the Minneapolis-St. Paul, Minnesota metropolitan area¹²⁸ to illustrate the national problem of concentrating poverty¹²⁹ and race which leads to effective segregation

127. See *supra* note 123.

128. People commonly refer to Minneapolis and its surrounding suburbs as the "West Metro" area, and to St. Paul and its surrounding suburbs as the "East Metro" area. The Metropolitan Council, the Twin Cities regional planning agency, defines West Metro as Hennepin, Anoka, Carver, and Scott counties. See METROPOLITAN DEVELOPMENT AND INVESTMENT FRAMEWORK Table A-1 (1988).

129. Poverty in the United States continues to concentrate geographically in our central city neighborhoods. See MASSEY & DENTON, *supra* note 17; WILSON, *supra* note 17; Sclar, *supra* note 18. Non-poor persons rarely have contact with persons living in poverty and are largely unaware of their living conditions. Most contact occurs through the media, most often during fearful discussions about the "war on drugs" or escalating crime. Commuters will occasionally see a homeless person on the street or an unemployed person standing by the freeway holding a "Will work for food" sign. From these limited contacts, the elaborate myths describing a dysfunctional "poverty culture" derives popular support. Whatever poverty's true cause, it affects those who live with it daily, the society as a whole, and future generations. By the end of the 1980s, 13.1% of the U.S. population lived below the poverty level. This figure represents 31.9 million people. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 458 tbl. 743. The total number of very poor, poor, and near poor individuals is 42.6 million. *Id.* at tbl. 744. In the West Metro Area in 1980, approximately 7.4 percent of the population lived below the poverty line. This figure represents 90,300 persons of the 1.2 million West Metro population. UNITED WAY OF THE MINNEAPOLIS AREA, THE FACE OF THE TWIN CITIES: TRENDS AFFECTING HEALTH AND HUMAN SERVICES IN THE 90's, at 24 (1991). For housing program purposes, a household meets the low-income criterion if its gross income does not exceed 50% of the median household income for the geographic area adjusted for household size. Moderate-income households have incomes between 50% and 100% of that median household income. Memorandum from Kathy Novak, *supra* note 55, at 3-4. One person households within this group earn \$6,024 or less gross income annually and four person households earn \$12,092 or less annually. *Id.* In contrast, Twin Cities median incomes rose to \$35,700 for one person households and \$51,000 for four person households. In fact, these incomes are 592% and 422% of the poverty line respectively. The Twin Cities ranks eleventh in per capita monetary income in a sample of 281 U.S. metropolitan areas. U.S. BUREAU OF THE CENSUS, A STATISTICAL ABSTRACT SUPPLEMENT: STATE AND METROPOLITAN AREA DATA BOOK 1991, at 34, Table A.

lawsuits. The Minnesota legislature joined a number of states in passing statutes designed to avert fair housing litigation.¹³⁰ The most dramatic reform occurred when the legislature created the Metropolitan Housing and Redevelopment Authority (Metro HRA) in 1974.¹³¹ Previously, only individual communities could apply for authorization to act as housing and land-use planning bodies in order to supplement federal agency efforts.¹³²

1. The Metropolitan Housing Authority's Effect on Segregation through Low-Income Housing Supply

The Metropolitan Housing and Redevelopment Act of 1974 vested the Metropolitan Council¹³³ with full powers to act as a

Although a smaller than national percentage of Twin Cities residents lives in poverty, the gap between median and low-income households is dramatic.

In Minneapolis, the 1980 poverty rate reached 13.5 percent across all groups, but significantly differed among groups to the detriment of persons of color as follows: African-Americans, 30%; Native Americans and Asian-Americans, 40%; female-headed households, 30%; and children under 18 living with their families, 18%. UNITED WAY *supra*, at 10. Approximately three-quarters of the entire West Metro population of color resides in Minneapolis itself. *Id.* Studies show that as minority concentrations increase within a neighborhood, white and affluent residents begin to leave in accelerating numbers. See ORFIELD AND ASHKINAZE, *supra* note 17, at 12-13, 25. Extreme segregation results, making many public housing projects clearly identifiable by race. HUD defines "clearly identifiable" to mean that a project houses a population 90% or more minority or varies by 15% or more from the representation of minorities in the overall tenant population for projects filled from the same waiting lists. See *Hollman v. Kemp*, No. 4-92-712, 34 (D. Minn. filed July 27, 1991) (complaint on file with the *Minnesota Law Review*).

130. Some commentators believe this movement occurred in response to New Jersey's exclusionary zoning prohibition, later codified in N.J. STAT. ANN. § 10.5.1 (West 1992). Interviews, *supra* note 98.

131. 1974 Minn. Laws 359, § 1; MINN. STAT. ANN. § 473.01 (West 1992); *supra* note 99 (interviews).

132. *Supra* note 99 (interviews).

133. In 1967, the Minnesota Legislature created the Metropolitan Council, a state agency that functions as a regional level of government "to coordinate the planning and development of the metropolitan area." The legislation established a regional government agency uniquely capable of dealing effectively with the problems of an entire metropolitan area." STATE OF MINN. DEPT OF ADMIN., MINNESOTA GUIDEBOOK TO STATE AGENCY SERVICES 1987-1990, at 242 (6th ed. 1987) [hereinafter MINNESOTA GUIDEBOOK]; MINN. STAT. §§ 473.122-473.249 (1992); MINN. R. 5800.0100-5800.0150 (1992). The council has seventeen members, sixteen of whom the governor appoints to four-year terms, and the seventeenth is a full-time chair appointed to no specific term. The Council's full-time paid staff number approximately 200. MINNESOTA GUIDEBOOK, *supra*, at 242. Operating through a committee structure, the Council plans for major regional systems governing sewers, airports, housing, parks, highways, transit, air and water quality, solid waste, land use, health, arts, and services to aging. *Id.* The Metropolitan Council promulgated a *Metropolitan Development Guide*

regional housing and land-use planning authority.¹³⁴ The Act explicitly addressed low-income housing needs.¹³⁵ The legislature ordered the Metropolitan Council, as Metro HRA, to adopt regulations, standards, and guidelines to determine which matters it considered of metropolitan significance¹³⁶ and to establish procedures for reviewing these matters "to promote the orderly and economic development, public and private, of the metropolitan area."¹³⁷ The legislature further required that "[t]he council shall review all proposed matters determined to be of metropolitan significance as to their consistency with and effect upon metropolitan system plans . . . and their adverse effects on other local governmental units."¹³⁸

as required by MINN. STAT. § 473.145 (1992), consisting of "a compilation of policy statements, goals, standards, programs, and maps prescribing guides for the orderly and economical development, public and private, of the metropolitan area." *Id.* The guide "shall recognize and encompass physical, social, or economic needs of the metropolitan area and those future developments which will have an impact on the entire area . . ." *Id.* The *Metropolitan Development Guide* contains numerous chapters that undergo frequent revision. The chapter most applicable to housing issues is the *Housing Development Guide* which codifies the Metro HRA's housing regulations. The Metropolitan Council adopted the *Housing Development Guide* in 1971. The Council amended the housing guide in 1975, 1977, 1985, and 1988 as a chapter of the *Metropolitan Development Guide*.

134. 1974 Minn. Laws 359 § 3.

135. 1974 Minn. Laws 359 § 1; MINN. STAT. § 473B.15 (1974) (repealed 1975 as obviated).

The conditions found to exist by the municipal housing and redevelopment act as amended continue to exist . . . ; substandard, slum and blighted areas exist in the metropolitan area which cannot be redeveloped without government assistance; there is a shortage of decent, safe and sanitary dwelling accommodations available to persons of low and moderate income at rentals or prices they can afford; many municipalities in the metropolitan area are unable adequately to provide the financing and staff necessary to an effective municipal housing and redevelopment authority; for each such municipality to establish a separate authority would result in an inefficient use of manpower and services; and there is therefore a need to enable the metropolitan council to make available to the municipalities in the metropolitan area those services provided for in the municipal housing and redevelopment act.

MINN. STAT. § 473B.15 (1974) (repealed 1975 as obviated).

136. The Act enumerated factors that the Metro HRA must consider in deciding whether a matter is of metropolitan significance. MINN. STAT. § 473B.061, subd. 2 (repealed 1975). The legislature ordered the Metro HRA to promulgate regulations accordingly and submit them for approval during the 1975 legislative session. MINN. STAT. § 473B.061, subd. 1 (1974) (repealed 1975).

137. MINN. STAT. § 473.173, subd. 2 (1992).

138. MINN. STAT. § 473.173, subd. 4(6) (1992). In addition, the Metro HRA, under MINN. STAT. § 473.171 (1992), reviews for approval any applications for

In answer to its statutory mandate to act as Metro HRA, the Metropolitan Council adopted a number of regulations and revised others,¹³⁹ including a regulation which dealt specifically with how communities must supply a share of the low-income housing supply, Policy 39.¹⁴⁰ Policy 39 states “[i]n reviewing applications for funds, the Metropolitan Council will recommend priority in funding based on the local unit of government’s current provision of housing opportunities for people with low and moderate incomes, and its plans and programs to provide such housing opportunities in the future.”¹⁴¹ In 1976, the Metro HRA revised its housing allocation plans to compare numerically each community’s low-income housing supply to the entire region according to a five-factor formula.¹⁴² The Metro HRA then prioritized funding requests for community infrastructure or development projects according to community success in supplying low- and moderate-income housing.¹⁴³ The Metro HRA also offered communities an additional incentive to participate: ac-

state and federal aid having metropolitan impact, and under MINN. STAT. § 473.175 (1992 & Supp. 1993), reviews for comment and recommendation local comprehensive development plans. The Council may require a local government to revise its comprehensive plan and may sue the community if necessary to force a revision. *Id.* at subd. 1, 3. It is unclear from the statute whether housing oversight was meant to be part of this power under the comprehensive plan review process. The comprehensive plan review process, however, should include making certain that the plans are consistent with metropolitan system plans.

139. See *supra* notes 133-135 (discussing the structure and role of the Metropolitan Council).

140. The Metro HRA adopted Policy 39 (then Policy 13) as part of the *Metropolitan Development Guide’s* housing chapter, February 25, 1971, despite strong suburban opposition. Memorandum from Phil Cohen to Metropolitan Council (Oct. 26, 1978) (on file with the Metropolitan Council). Even though a locality’s participation in the Metro HRA is strictly voluntary, in order to receive certain funding, the locality must submit to the Metro HRA a comprehensive plan subject to “fair share” review. *Id.* at 12-13.

141. METROPOLITAN COUNCIL, 6 HOUSING DEVELOPMENT GUIDE 45 (1985). Policy 13 originally read, “Assign a lower priority in the review of federal fund requests to municipalities whose plans and ordinances do not provide for low- and moderate- income housing.” Memorandum from Phil Cohen, *supra* note 140, at 15 app. The 1973 and 1977 amendments to Policy 13 softened its wording, sounding more positive, yet allowing the Council to reach communities that did not adequately provide for low- and moderate-income housing. In 1974, the Council assigned numerical rankings for the first time under Policy 39 (then Policy 31) to show each community where it stood in relation to the entire region, perhaps in response to the *Mount Laurel* final decision. *Id.*; see *supra* notes 116-117 and accompanying text (discussing *Mount Laurel* decision).

142. Memorandum from Phil Cohen, *supra* note 140, at 7-8 (describing the five-factor formula).

143. *Id.* at 10.

cess to federal housing assistance programs, then ripe with funding.¹⁴⁴

During the years in which the Metro HRA strongly enforced Policy 39,¹⁴⁵ the suburban share of subsidized housing units increased dramatically.¹⁴⁶ One supporter noted that the changes occurred without litigation because the Council had recognized and addressed the regional nature of fair housing issues.¹⁴⁷ When the federal budget for public housing subsidies declined in the early 1980s, the Metropolitan Council relaxed its Policy 39 review process.¹⁴⁸ No one explored alternative means to offset inconveniences communities might encounter in assuring their share of low-income housing units.¹⁴⁹ Although the advent of portable housing vouchers greatly reduced the need to construct public housing projects and nearly eliminated the cost to communities of supplying low-income housing,¹⁵⁰ in the absence of

144. *Id.* at 10-11.

145. The Council enforced Policy 39 vigorously from its inception in 1971 until 1978. It has not reviewed a single funding request on Policy 39 grounds since the early 1980s. *Supra* note 99 (interviews).

146. The share increased from 10% of the total (1878 units) to 35% of the total (11,311 units), while the central city share decreased from 90% to 65%, and the number of communities providing subsidized rental housing increased nearly seven-fold. Cohen, *supra* note 139, at 3. Cohen also mentioned that 58% of subsidized suburban units became available to families whereas before, most suburban units were available only to the elderly. The housing allocation plan set a goal of 40% elderly and 60% family units in 1976. *See* Memorandum from Trudy McFall to Metropolitan Council (Dec. 18, 1975) (discussing impact of 1975 Metropolitan Allocation Plan for subsidized housing) (on file with the Metropolitan Council of the Twin Cities).

147. "This progress has been achieved with an almost total absence of the court actions that have plagued other regions of the nation and which have, in various ways, established a growing legal foundation for the concept that low-income housing is a regional, and not purely local, responsibility." Memorandum from Phil Cohen, *supra* note 140, at 4.

148. Federal assistance declined in the early 1980s from 4000 new units per year to 500 new units per year for the metropolitan area. Telephone Interview with Research Department, Metropolitan Council (October 1, 1993). Nevertheless, opening 500 additional units per year in the booming suburbs to low-income families of color would make a tremendous impact on intra-community segregation. Also, federal funding for housing subsidies should increase in light of growing concerns about inner-city isolation. Suburban communities should at least make a good faith showing by openly planning to improve low-income housing availability should federal funding increase. The Metropolitan Council could conduct Policy 39 review of applications requesting funding under transportation, highway, and sewer bonding authority. If metropolitan dollars pay for suburban expansion, some of those resources should be applied toward de-segregated housing. Interviews, *supra* note 99.

149. *Supra* note 99 (interviews).

150. CMAL, *supra* note 2, at 27.

extra support, metropolitan communities became more resistant to Policy 39.¹⁵¹

Apparently, some improvement continued in the suburban-to-city low-income housing supply ratios even after Policy 39 enforcement ceased.¹⁵² Comparing these figures with annual supply rates, however, demonstrates the danger of premature optimism.¹⁵³ Because demand for subsidized housing continues to grow,¹⁵⁴ slowing supply rates in the suburbs and increasing supply rates in the cities will tend to accelerate race and poverty concentration. Seeing boom growth occurring in several residential suburbs,¹⁵⁵ one might expect suburban growth in low-

151. *Supra* note 99 (interviews).

152. By mid-1992, suburban communities supplied approximately 44% of total subsidized units while the central cities supplied the remainder. Metropolitan Council, *Changes in the Subsidized Housing Market in the Twin Cities Metropolitan Area, 1980-1989*, at tbl. B-2 (Janet Pershing, ed., 1990), reprinted in *CNAL*, *supra* note 2, at 28 [hereinafter *Changes in the Subsidized Housing Market*]. The following data represent a sampling of low-income housing supply ratios at three stages of enforcement.

	Pre-Policy 39	Policy 39 Peak	Post-Policy 39
central cities	90%	65%	56%
(annual rate)	—	357/yr	496/yr
suburbs	10%	35%	44%
(annual rate)	—	1250/yr	805/yr

Id. The annual rate is averaged over a number of years to adjust for market fluctuations. For example, between 1971 and 1978, the peak enforcement years, the central cities supplied a total of 2500 additional units or 357 per year. *Id.*

153. *Id.* After enforcement ceased, the annual supply rate increased in the central city to 496 additional units per year and decreased in the suburbs to 805 additional units per year: the central city rate increased by 39.3%, and the suburban rate decreased by 35%. *Id.* Furthermore, the ratio of elderly to family units had once again shifted from 42%/58% to 76%/24% against a 40%/60% ideal despite sharp increases in the number of low-income families needing subsidized housing. Percentages derived from *Changes in the Subsidized Housing Market*, *supra* note 152, at 28.

154. MEETING THE REGION'S HOUSING NEEDS, *supra* note 55, at 15.

155. Nearly all jobs that low-income persons can obtain are created in the outer-ring suburbs, yet housing available to them concentrates in the central city. John Kasarda names this pattern "spacial mismatch" and argues that spacial mismatch perpetuates poverty because without housing or transit help, people living in poverty cannot bridge the geographic gap between where they can afford to live and where they can obtain a job. Kasarda (1989), *supra* note 18, at 35. Minneapolis employment decreased 24% after 1980, and outer-ring suburban employment increased 127% over the same time period. UNITED WAX, *supra* note 17, at 20. Transportation and information inadequacies act as hiring and commuting barriers. Two researchers, WILSON, *supra* note 17, at 182-83; and KAUS, *supra* note 18, at 120, attribute continuing poverty in part to these barriers. These barriers have combined to produce a grim result: West Metro residents living in poverty have concentrated primarily in four central Minneapolis neighborhoods where jobs are being lost, not created. UNITED

income housing to at least keep pace with previous rates. City-to-suburban supply ratios have not returned to pre-Policy 39 levels,¹⁵⁶ but the statistical trend demonstrates that they have deteriorated since enforcement ceased and could revert to the levels which originally sparked intervention.¹⁵⁷ By the end of 1989, the federal¹⁵⁸ and Minnesota¹⁵⁹ governments subsidized¹⁶⁰ approximately 44,366 housing units¹⁶¹ in the Twin Cit-

WAY, *supra* note 17, at 25; *see also*, Bob Gilbert, *Do suburbs owe a debt to the city?*, SOUTHWEST J. Aug. 1991, at 6, 7; Peter Leyden, *Job gap growing between city, suburbs*, MINNEAPOLIS STAR TRIB. June 16, 1992, at 1A, 10A (reporting Minnesota Department of Jobs and Training data). In 1980, 70% of West Metro residents living in poverty resided in Minneapolis, with 61% of West Metro residents living in poverty concentrated in four neighborhoods: Near North, Central, Powderhorn, and Phillips. UNITED WAY, *supra* note 17, at 25. In 1988, 74% of residents in those neighborhoods received public assistance. *Id.* These patterns describe concentrating poverty. Exclusionary zoning, a practice thriving in most developing suburbs and re-gentrifying city areas, prevents construction of housing accessible to low-income persons. Dubin, *supra* note 12, at 755-56, 768-73. Exclusionary ordinances might, for example, require high minimum lot size and square footage, garages, and other expensive amenities; or prohibit attached housing, mobile homes, or anything other than detached, single-family homes. For excellent discussions of exclusionary zoning, see Dubin, *supra* note 12; John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361, 362, 370 (1988).

156. MEETING THE REGION'S HOUSING NEEDS, *supra* note 55, at 20.

157. *See supra* notes 152-153 (data analyzed).

158. Currently, HUD restricts federal housing subsidies to persons and families with incomes at or below 80% of median income, adjusted for household size and geographic area, for example, \$40,800 for a Twin Cities household of four. Novak, *supra* note 55, at 3-4. This limit should capture low-income households and many moderate-income households, yet low-income housing remains scarce. In Minneapolis, around 5000 families participate in publicly subsidized housing but approximately 3800 families and 1700 additional individuals are on the waiting lists. *Hollman* complaint, *supra* note 26, at 14.

159. Although nearly one-third of all renter households exceeded the HUD guideline to pay their rent, only 15% of all renter households received any subsidies. MEETING THE REGION'S HOUSING NEEDS, *supra* note 55, at 18-19. Just over one-third of households living below the poverty line received some housing assistance. *Id.* at 19.

160. Subsidies take the form of public housing in projects or scattered-site plans or vouchers which pay the difference between 30% of the household's income and the unit's market value. Novak, *supra* note 55, at 3. HUD places strict maximum market value limits on the units it will subsidize. These limits seem fair for cost-containment reasons, but they inadvertently provide one mechanism by which private landlords can exclude low-income persons, the practice of raising the rent to just above HUD limits so that the units cannot be subsidized. *See Hollman* complaint, *supra* note 26, at ¶¶ 109-11 (discussing authorization needed to rent more expensive units).

161. MEETING THE REGION'S HOUSING NEEDS, *supra* note 55, at 19. The metropolitan area supplies about 900,000 total housing units, including 300,000 rental units. *Id.* at 16. The two central cities supply 57% of total subsidized

ies metropolitan area, but the government-defined need was at least twice that number.¹⁶²

2. Reviewing the Metropolitan Housing Authority's Actions

The Metropolitan Council is a state administrative agency, covered by the Administrative Procedures Act (APA).¹⁶³ The Metropolitan Council, acting as the Metro HRA, adopted Policy 39 in response to a legislative mandate to address problems of metropolitan significance.¹⁶⁴ In determining whether the Metro HRA has acted legally with respect to relaxing Policy 39 enforcement, the court faces threshold questions such as whether and to what extent it may review Metropolitan Council actions.

III. VIEWING METROPOLITAN HOUSING AUTHORITIES AS INDISPENSABLE PARTIES IN FAIR HOUSING SUITS

In reviewing defendant metropolitan housing agencies' inaction with respect to fair housing issues, courts may decide to follow strict administrative law precedent, or they may decide to extend principles obtained directly from cases concerning HUD's

housing, while approximately 150 suburbs supply the remainder; some suburbs have no subsidized units at all. *Id.* at 20.

162. *Id.* at 18, 19. Federal housing assistance decreased after the early 1980s, but poverty increased. Nenno, *supra* note 2, at 260, 261, 264. In 1985, the Metropolitan Council of the Twin Cities estimated that before 1995, low-income households would require one-fifth of the entire Twin Cities housing supply, including nearly one-third of any new units added. METROPOLITAN COUNCIL, *supra* note 141, at 7. Ideally, 30% of those new units should have two bedrooms, and 36% three bedrooms. *Id.* The central neighborhoods of Minneapolis and St. Paul cannot continue to absorb these increases.

Multifamily dwellings, such as apartment buildings and other attached housing, often best suit low-income persons' needs and are concentrated in the central cities and first-ring suburbs. Multifamily housing accounts for approximately 34% of the total Twin Cities housing units. MEETING THE REGION'S HOUSING NEEDS, *supra* note 55, at 16. Most so-called multifamily structures contain only studio or one-bedroom units. Units with two or more bedrooms comprise only 21.3% of central city units, 16.4% of first ring suburb units, 11.4% of second ring suburb units, and 11.3% of outer ring suburb units. Metropolitan Council of the Twin Cities, unpublished data. In 1975, the Metropolitan Council established a guideline that 60% of metro area subsidized housing should serve multiple person households (approximately 40% should serve elderly). Memorandum from Trudy McFall, *supra* note 146, at 2. By 1992, only 24% of subsidized housing served this type of household. *See supra* note 152 (data analyzed).

163. MINN. STAT. § 473.173, subd. 5 (1992) (applying the Minnesota codification of the APA to review of matters of metropolitan significance).

164. *See supra* note 133 (discussion of Metropolitan Council).

behavior to analogous agencies at other government levels.¹⁶⁵ When plaintiffs in a metro desegregation case do not include a relevant metropolitan housing authority as a defendant, the court should order the agency to join the suit as a defendant and should review its actions under the HUD "affirmative duty" standard.¹⁶⁶

A. WHY TRADITIONAL REMEDIES FAIL TO ADEQUATELY ADDRESS REGIONAL HOUSING ISSUES: THE PATCHWORK REMEDY PROBLEM

Because so many actors affect low-income housing accessibility, plaintiffs filing housing segregation complaints must ordinarily plead numerous liability theories against multiple defendants.¹⁶⁷ These defendants often include several layers of government that administer housing programs.¹⁶⁸ The liability facing each government layer derives from a different source of law.¹⁶⁹ Providing an adequate remedy grows increasingly complex as metropolitan areas rapidly expand and develop.¹⁷⁰

In Minnesota, no entity other than the Metro HRA can fill the jurisdictional gaps and level the inter-community playing field adequately to correct metropolitan-wide segregation.¹⁷¹ Without Metro HRA participation, a court can create a truly metropolitan solution if three conditions exist. First, every community within the metropolitan area must establish and fund its own PHA.¹⁷² In addition, HUD or the CDBG program¹⁷³ must maintain a funding presence with each PHA.¹⁷⁴ Finally, zoning in each community must permit some construction of non-luxury, multifamily housing in which households use vouchers to purchase housing.¹⁷⁵ Unfortunately, none of these three conditions are satisfied in the Twin Cities metropolitan area.

165. See *supra* notes 64-91 and accompanying text.

166. See Roisman & Tegeler, *supra* note 5, at 338.

167. *Id.*

168. *Id.*

169. *Id.* at 338-41.

170. *Id.* at 328.

171. See *supra* note 133 and accompanying text (discussing Metropolitan Council jurisdiction).

172. See *supra* note 63 (describing PHA liability).

173. See *supra* note 62 and accompanying text (describing the duties that accompany federal and some state dollars).

174. See *supra* notes 61-62.

175. See *supra* note 150.

1. Federal Agency Liability: Requiring HUD to Act

When HUD does not affirmatively promote fair housing, reviewing courts can order it to take extensive corrective action.¹⁷⁶ Violations of the affirmative duty can include administering effectively segregated housing, failing to actively provide desegregated housing, or failing to properly oversee grantee PHA's.¹⁷⁷ Unfortunately, if a community does not have a PHA or its PHA does not receive HUD funding, a condition likely in wealthy or swiftly-growing suburbs, courts cannot reach PHA behavior via HUD in order to fashion a remedy.¹⁷⁸ Remedies provided in this context can only produce fairer housing in a patchwork pattern across a metropolitan area, skipping those localities least likely to supply their fair share of low-income housing.¹⁷⁹

In communities that have no connection with HUD, courts can order HUD to form a presence and allocate resources to create fair housing opportunities.¹⁸⁰ In practice, however, this type of order lacks impact because implementation strategies often fail.¹⁸¹ HUD project proposals must survive local zoning scrutiny; a court mandate to HUD cannot overcome local zoning board opposition.¹⁸² If HUD offers localities financial incentives to provide more low-income housing, it must expend large sums, particularly in affluent suburbs, to encourage localities to alter the reliable status quo.¹⁸³ HUD could increase the number of vouchers in circulation, but low-income persons cannot use HUD subsidies in the suburbs if the only available housing exceeds the fair market price or if landlords refuse to participate.¹⁸⁴ Thus, plaintiffs may "win", but very few members of the class will actually gain access to suburban housing.¹⁸⁵

176. See *supra* notes 59-69 and accompanying text (discussing HUD obligations).

177. See *supra* notes 59-69 and accompanying text.

178. See *supra* notes 59-69 and accompanying text.

179. See *supra* notes 59-69 and accompanying text.

180. *Hills v. Gautreaux*, 425 U.S. 285, 286 (1976); see also *supra* text accompanying note 86.

181. See *supra* note 24.

182. See *supra* note 20.

183. See *supra* note 24.

184. See *supra* note 17.

185. See *supra* note 17.

2. Establishing Local PHA Liability

Recipients of particular HUD-managed or CDBG funds¹⁸⁶ must affirmatively administer all housing and community development programs to further Title VIII goals, but not every PHA receives those grants.¹⁸⁷ Only one circuit has explicitly recognized that the obligation to promote fair housing extends to PHA's regardless of whether they receive conditional funding.¹⁸⁸ Recognizing that all federal housing operated under intentional segregation until some time between 1954 and 1968, many courts give deference to arguments that effective segregation patterns within those programs derived from long term intentional segregation.¹⁸⁹ Courts should similarly recognize that state and local intentional segregation probably leads to effective segregation in long standing programs operating today.¹⁹⁰ If federal statutory obligations do extend to PHA's, then at least those PHA's which operated under de jure segregation must affirmatively promote fair housing.¹⁹¹ Even this generous analysis cannot reach the suburbs that only recently established PHA's.

Commentators recognize that although local agency and city liability arguments can be helpful, they have not been an essential focal point for lawsuits because they are individually responsible for small pieces of the regional problem.¹⁹² Minnesota communities may establish PHA's, but they are not required to do so.¹⁹³ In *Hollman*, plaintiffs residing within the Minneapolis city limits sued the city of Minneapolis and its PHA.¹⁹⁴ Although this suit can perhaps address the inter-

186. See *supra* note 4 (introducing Community Development Block Grants (CDBG)).

187. *Id.* A community could defensively form a PHA and support it with private funding alone, thus preventing HUD or other PHA's from administering programs within that community.

188. See *Otero v. New York City Hous. Auth.*; 484 F.2d 1122, 1133-34 (2d Cir. 1973) (noting that the duty to integrate arises in part from Title VIII, 42 U.S.C. §§ 3601, 3608(d)(5) (1988)).

189. Roisman & Tegeler, *supra* note 5, at 339.

190. *Id.*

191. *Id.*

192. *Id.* at 340.

193. See MINN. STAT. § 473B (1992).

194. See *supra* note 26 and accompanying text (discussing the facts from *Hollman v. Kemp*, No. 4-92-712 (D. Minn. filed July 27, 1991)). Although plaintiffs implicated five defendants, should plaintiffs prevail, they cannot achieve a comprehensive, metropolitan remedy through these defendants.

neighborhood segregation problems, it cannot fully address segregation resulting from city-suburban housing disparities.¹⁹⁵

3. Suing Communities Piecemeal: An Inefficient Option

Plaintiffs in a metro desegregation case can attempt to make each suburb a defendant or bring a test case against one suburb.¹⁹⁶ In order to state a constitutional or federal civil rights¹⁹⁷ claim against a local government unit for exclusionary zoning,¹⁹⁸ the plaintiffs must present one of two difficult scenarios. They must demonstrate either that the suburb intended to discriminate or that the zoning board action directly caused city-suburban segregation.¹⁹⁹ Zoning boards do not exclude low-income persons or persons of color directly, but according to indirect, effective criteria.²⁰⁰ Consequently, the former claim historically fails.²⁰¹ Cause-in-fact arguments made by non-residents of the community rarely succeed.²⁰²

Local government units derive zoning power from state police power.²⁰³ Plaintiffs attempting to establish local liability in the absence of a valid federal civil rights claim need to theorize either a state constitutional violation²⁰⁴ or a state statutory violation.²⁰⁵ If plaintiffs add state law claims to their federal claims before a federal court, the state law claims must survive supplemental jurisdiction scrutiny.²⁰⁶ In either district or state court, standing issues might defeat the claims unless suburban residents join as plaintiffs and allege that the exclusionary zon-

195. See *supra* note 26 and accompanying text (discussing the facts from *Hollman v. Kemp*, No. 4-92-712 (D. Minn. filed July 27, 1991)).

196. Roisman & Tegeler, *supra* note 5, at 323.

197. 42 U.S.C. § 1983 (1988).

198. Exclusionary zoning arguably perpetuates city-suburban inequities. Dubin, *supra* note 12, at 773.

199. Roisman & Tegeler, *supra* note 5, at 314-19.

200. See *supra* text accompanying notes 53, 55, 152.

201. *Id.*

202. *Id.*

203. Roisman & Tegeler, *supra* note 5, at 320-21; Dubin, *supra* note 12, at 775.

204. The *Mount Laurel* approach treats zoning as an exercise of the police power which must promote the general welfare, meaning the welfare of persons residing within and outside the locality. Roisman & Tegeler, *supra* note 5, at 344.

205. *Id.*

206. See *supra* note 28. If the supplemental jurisdiction request fails, the appropriate state court must hear these claims in a completely separate action, no less complex due to the number of defendant suburbs.

ing harms members of the suburb by depriving them of a diverse community.²⁰⁷

B. THE PROPOSED REMEDY: ORDERING METROPOLITAN AGENCIES TO JOIN AND REVIEWING THEM UNDER THE HUD AFFIRMATIVE DUTY STANDARD

The pending *Hollman* litigation ignores one crucial actor, the Metro HRA.²⁰⁸ Plaintiffs in similar cases throughout the nation may also exclude metropolitan PHA's, particularly if the *Hollman* case proceeds in the Metro HRA's absence.²⁰⁹

Under Minnesota law, the Metro HRA acts as the housing authority for any communities that do not establish independent PHA's,²¹⁰ reviews all local comprehensive plans for consistency with the Metropolitan Development and Investment Framework,²¹¹ and assists localities in accessing federal housing funds and other funds necessary for community development and expansion.²¹² Without implicating the Metro HRA, plaintiffs cannot achieve complete relief.²¹³ Not only does the Metro HRA administer subsidized housing where no PHA exists, it has the authority to review every local comprehensive plan to determine if the locality participates in providing low-income housing and it can design incentives through other programs under its authority which HUD cannot access.²¹⁴ In order to affect otherwise unreachable areas and treat suburbs consistently in imposing a remedy, the court should order the Metro HRA to join as a defendant. Before reaching other issues the court should review the Metro HRA's actions and determine whether the Metro HRA has violated an affirmative duty to administer publicly funded housing in furtherance of fair housing principles.

207. See *supra* note 44 and accompanying text (discussing exclusionary zoning claims).

208. See *supra* note 133 and text accompanying notes 133-138 (discussing Metropolitan Council powers arising from the Metropolitan Housing and Redevelopment Act of 1974).

209. See *supra* note 26 and accompanying text.

210. See *supra* note 133 and text accompanying notes 133-138 (regarding Metropolitan Council powers).

211. See *supra* note 138 (discussing Metropolitan Council review powers).

212. See *supra* notes 138-141 and accompanying text.

213. See *supra* notes 138-141 and accompanying text.

214. See *supra* notes 138-141 and accompanying text.

1. The Court Should Order the Metro HRA to Join as a Defendant

When both plaintiffs and defendants fail to involve the appropriate metropolitan agency in a metro desegregation case,²¹⁵ the court should order joinder so that it can accord complete relief.²¹⁶ In the Minnesota example, the district court should order the Metro HRA to join the suit as a defendant.²¹⁷ By ordering joinder with respect to the effective segregation claim,²¹⁸ the court would overcome the barriers which dissuade plaintiffs from naming the metropolitan authority in the original complaint²¹⁹ and serve the interests of judicial economy. Ordering joinder reduces the likelihood that counterclaims and cross-claims will arise later in the suit.²²⁰ Although adding another party might initially make the litigation more complex, this consideration weighs lightly against the likelihood that the claim against the metropolitan authority can be resolved more swiftly than claims against the other parties.²²¹ Redress can begin while the court hears the remainder of the case over the course of many years.

2. Reviewing the Metro HRA's Behavior Under the Affirmative Duty Standard

The metropolitan agency may move to dismiss for lack of jurisdiction on the grounds that the court cannot review agency action in such a case.²²² Although the Supreme Court recently reversed the general presumption of review to a presumption of non-review,²²³ plaintiffs can rebut the presumption in several ways.²²⁴ If the agency is not acting in a prosecutorial manner, if the enabling statute directs the agency to take action in particular circumstances, or if the agency action falls under section 706

215. See *supra* notes 26-27 (discussing plaintiffs' suit management concerns).

216. See *supra* note 16 and accompanying text.

217. See *supra* note 99 (interviews).

218. Plaintiffs would argue that much of the segregative effect resulted from arbitrarily ceasing Policy 39 enforcement and would offer demographic evidence.

219. See *supra* notes 26-28 and accompanying text.

220. This lack of predictability threatens judicial economy and reasonable resolution of the parties' interests. *Supra* note 99 (interviews); *supra* note 123 (discussing judicial economy).

221. The matter would probably be resolved through a consent decree or settlement before trial. *Supra* note 99 (interviews).

222. See *supra* notes 73-79 and accompanying text.

223. *Heckler v. Chaney*, 470 U.S. 821 (1985).

224. *Id.*

of the Administrative Procedures Act, the unreviewability presumption does not apply.²²⁵

Far from acting in a prosecutorial manner, the Metro HRA serves a primarily advisory role, assigning priorities to community plans and applications in accordance with regulations the legislature requested.²²⁶ Those priority ratings then trigger other consequences.²²⁷ The Metro HRA Act limits the agency's discretion, requiring it to review enumerated matters in accordance with regulations to be adopted and relevant statutes.²²⁸ Finally, the APA permits review under section 706 because allegedly, the agency has unlawfully withheld fair housing enforcement—action it is bound to provide.²²⁹

A duty to enforce fair housing regulations such as Policy 39 could derive from three different sources under traditional administrative law: the agency's authorizing statute itself,²³⁰ a long-standing pattern of past agency practice,²³¹ or the developing principle²³² that when an agency voluntarily adopts regulations they must be enforced as if dictated by statute.²³³ The Metro HRA Act imposes an explicit duty to promulgate regulations but does not explicitly state a duty to enforce those regulations.²³⁴ Instead, the court would look to the decade or more during which the Metro HRA enforced Policy 39 to find that a settled rule had been followed during that time.²³⁵ If it finds that the Metro HRA has since departed from a settled rule without giving a contemporaneous explanation,²³⁶ the court must conduct a factual inquiry into the Metro HRA's rationale to determine whether a lawful basis for departure existed.²³⁷ Under developing case law, courts should hold metropolitan agencies bound by rules which were promulgated within the agencies' statutory discretion pursuant to the legislative purpose.²³⁸ Because the Metro HRA voluntarily adopted Policy 39 pursuant

225. *Id.*

226. *See cases supra notes 73-79 and accompanying text.*

227. Memorandum from Phil Cohen, *supra* note 140.

228. MINN. STAT. § 473B.061(3) (1974) (repealed 1975).

229. *See supra notes 76-79 and accompanying text (explaining application of APA in the Metro HRA).*

230. *See supra note 76 and accompanying text.*

231. *See supra note 77 and accompanying text.*

232. *See supra note 79 and accompanying text.*

233. *See supra notes 73-79 and accompanying text.*

234. *See supra note 133 and accompanying text.*

235. *See supra notes 77, 145 and accompanying text.*

236. *See supra notes 77, 145 and accompanying text.*

237. *See supra notes 77, 145 and accompanying text.*

238. *See supra notes 77, 145 and accompanying text.*

to its authority to oversee metropolitan area development, it should enforce the regulation.²³⁹

The Metro HRA administers HUD funds and acts as a public housing authority. Thus, the court should look beyond traditional administrative law and hold the Metro HRA to the HUD affirmative duty standard. The Metro HRA essentially acts in HUD's stead and arguably has accepted the affirmative duties incumbent upon HUD itself.²⁴⁰ For example, when formulating a remedy in Ohio,²⁴¹ the Court ordered the Toledo metropolitan PHA to take corrective action because it behaved as an extension of HUD, even though the PHA was not a defendant in the suit.²⁴² Similar reasoning applies to the Metro HRA as a HUD funding conduit. Once the affirmative duty to administer programs to further fair housing has been established, failing to enforce Policy 39, or repealing Policy 39 without adequate replacement, would violate that affirmative duty. The failure is evident by the long time lapse since the last Policy 39 priority assignment in the face of deteriorating housing distribution statistics.²⁴³

This Note does not suggest that having found metropolitan-wide segregation, a court can order the metropolitan housing agency to remedy the situation as the court pleases. For example, in *Hollman*, if the district court decides to formulate an order directing the Metro HRA to resume Policy 39 enforcement, the court could not make procedurally intrusive demands to specify a different manner in which the Metro HRA must enforce the regulation.²⁴⁴ Similarly, the court could not direct the Metro HRA to specifically enforce the policy as it did in the past.²⁴⁵ In formulating a remedy, the court will discover that Policy 39 contains its enforcement mechanism in its express lan-

239. See *supra* note 135 and accompanying text.

240. *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 837, 842 (N.D. Ohio 1989). Following the *Jaimes* court's reasoning, courts should hold grantee agencies accountable for administering HUD funding within HUD standards.

241. *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1101 (6th Cir. 1985).

242. *Jaimes v. Toledo Metro. Hous. Auth.*, 715 F. Supp. 835, 840-42 (N.D. Ohio 1989).

243. *Roisman & Tegeler, supra* note 5, at 318.

244. See *supra* note 105. The court can state what the agency must do, not how the agency should do its job. *NAACP v. Kemp*, 721 F. Supp. 361, 368 (D. Mass. 1989). At most, the court can order the agency to explore alternative funding sources but the court cannot specify how the agency should conduct the study. *Id.*

245. *Id.*

guage. The court can simply direct the agency to enforce the policy.

For other cases in which the metropolitan agency acts as a housing authority independent from HUD, courts ordering joinder have several options. When no fair housing regulation exists, the court can direct the housing authority to promulgate regulations and enforcement mechanisms only if the legislature has requested promulgation and the agency has not complied.²⁴⁶ If a regulation already exists but does not specify its enforcement mechanism, the court can require enforcement, but not a particular mechanism.²⁴⁷ When a regulation specifies its enforcement mechanism, the court can hold the agency bound by its own rules.²⁴⁸ Presumably, the agency must enforce its rule as the rule dictates.

An agency can decide to exhaust the appeals process to extract itself from the court order. This decision can delay the remedial process for years.²⁴⁹ If an agency refuses to comply with an enforcement order and does not appeal, the agency opens itself to greater scrutiny and deeper intervention should the plaintiffs or new parties bring another suit.²⁵⁰ Refusing to comply also places an agency in a delicate political position with its parent legislature. The legislature could construe refusal as tantamount to willfully refusing to perform a statutory mandate.²⁵¹

C. THE RELIEF: ORDERING THE METROPOLITAN HOUSING AUTHORITY TO ENFORCE AND SUPPORT ITS EXISTING FAIR HOUSING REGULATIONS

Once the court determines either that the metropolitan housing authority failed its obligation to enforce its own fair housing regulations, or alternatively that it shares HUD's affirmative duty to promote fair housing, the relief is straightforward and immediate. In *Hollman*, not only can the court order the Metro HRA to resume prioritizing community funding re-

246. *Id.*

247. Courts might be able to specify certain activities if the agency does not act independently from HUD. See *supra* notes 108-109 and accompanying text.

248. See *supra* note 79.

249. APA, *supra* note 73, §§ 705-06. If the trial court finds that the agency action was arbitrary and capricious, the court might discipline the agency for attempting to stall the remedial process. *Id.*

250. Roisman & Tegeler, *supra* note 5, at 335.

251. *Jaimes v Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1101 (6th Cir. 1985).

quests according to Policy 39 criteria, it can require the Metro HRA to explore alternative compliance incentives.²⁵² Because a complete administrative structure already exists,²⁵³ the comprehensive plan review process could begin immediately. Meeting increased low-income housing demand has become easier and more economically efficient since the innovation of portable subsidy vouchers and certificates.²⁵⁴ Positive changes occurred swiftly in the 1970s when the Metro HRA enforced Policy 39,²⁵⁵ and similar results could obtain today.²⁵⁶

Conclusion

When residents of segregated low-income housing sue federal, state, or local government actors for administering publicly funded housing in a manner which reinforces racially segregated housing patterns, but do not also sue the metropolitan housing authority, the court should take several steps to insure that complete relief can be accorded. First, the court should order the appropriate metropolitan housing authority to join as a defendant. The court should then review the alleged non-enforcement of fair housing regulations according to the HUD affirmative duty standard. In pre-trial conference, the court can suggest that the parties agree to adjudicate or settle the failure to enforce claim first. Once the court finds both a duty to enforce and failure to do so, courts should order the metropolitan authority to enforce its own fair housing policies as a necessary first step in fashioning a metropolitan-wide remedy.

Streamlining the remedies process in this manner provides a means to achieve fair housing in an efficient, humane, and legally appropriate manner. Fashioning remedies directed at agency enforcement might reduce future complex litigation, because the potential for such remedies disciplines agencies which have improperly relaxed enforcement and encourages state legislatures to fund incentives supporting legislative mandates.

252. Roisman & Tegeler, *supra* note 5, at 334 (citing Walker v. HUD, 734 F. Supp. 1231, 1233 (N.D. Tex. 1989); Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

253. See *supra* note 141 and accompanying text.

254. See *supra* note 32.

255. See *supra* notes 151-152.

256. CMAL, *supra* note 2, at 27.

