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Philip D. Tegeler

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HOUSING SEGREGATION AND LOCAL DISCRETION

*Philip D. Tegeler**

INTRODUCTION

The severe inequities that characterize American metropolitan systems of education, housing and employment are closely related to the geographic concentration of low-income families in inner city neighborhoods.¹ A high degree of racial isolation also frequently accompanies poverty concentration in urban schools² and neighborhoods.³ This physical separation and isolation of poor minority families deprives children of access to economic opportunity and perpetuates disadvantage across generations.⁴

* The author is an attorney with the Connecticut Civil Liberties Union Foundation ("CCLUF"), where he has been active in fair housing advocacy and litigation. He is currently co-counsel, with attorneys at New Haven Legal Assistance and the CCLUF, in a civil rights case pending against the U.S. Department of Housing and Urban Development ("HUD"). *Christian Community Action v. Kemp*, No. 3:91CV00296 (D. Conn. filed June 3, 1991). The author is grateful for the insights of Michael Hanley, Thomas Henderson and Glenn Falk.

¹ See DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 115-47 (1993).

² GARY ORFIELD, NATIONAL SCHOOL BOARDS ASS'N, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968* 21-22 (1993).

³ MASSEY & DENTON, *supra* note 1, at 115-47.

⁴ See Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 26 CLEARINGHOUSE REV. 335, 336-38 (1993); MASSEY & DENTON, *supra* note 1, at 148-85; Gary Orfield, *Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago*, in *URBAN LABOR MARKETS AND JOB OPPORTUNITY* (George E. Peterson and Wayne Vroman eds., 1992); see also ALEXANDER POLIKOFF, CENTER FOR HOUSING POLICY, *HOUSING POLICY AND URBAN POVERTY* (1994). Segregation in housing and schools is

After more than a decade of official neglect,⁵ regional housing desegregation has reemerged as an urgent theme of public policy. For example, early in his term, Henry Cisneros, Secretary of Housing and Urban Development ("HUD"), repeatedly decried "the extreme spatial segregation or separations in American life by income, class and race."⁶ Even before the Clinton administration took office, powerful new social science findings on the benefits of integration for participants in Chicago's *Gautreaux* housing mobility program⁷ had persuaded Congress to begin replicating the

often accompanied by disparities in educational resources, unequal housing and neighborhood conditions, inadequate levels of municipal services and general disinvestment in central city neighborhoods. *See generally* JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991); Elizabeth K. Julian & Michael M. Daniel, *Separate and Unequal: The Root and Branch of Public Housing Segregation*, 23 *CLEARINGHOUSE REV.* 666 (1989); MASSEY & DENTON, *supra* note 1; *see also infra* note 12 (historical role of government in fostering housing segregation).

⁵ *See* DAVID RUSK, *CITIES WITHOUT SUBURBS* 3, 121 (1993); MASSEY & DENTON, *supra* note 1, at 1-16.

⁶ *Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 2d Sess. 7 (Apr. 28, 1993) (statement of Henry Cisneros, Secretary of Housing and Urban Development). In his testimony, Secretary Cisneros warned that "[u]nless we can deconcentrate the populations of our poorest . . . [u]nless we can make it possible for people to have greater choice and move to suburban areas . . . we will not succeed." *Id.* at 7-8. HUD's new emphasis on regional housing opportunities is also reflected in an early policy report, *Creating Communities of Opportunity: Priorities of U.S. Department of Housing and Urban Development* (1993), and in HUD's 1994 proposals to Congress, HUD FY 1995 BUDGET: EXECUTIVE SUMMARY (1994) [hereinafter FY 1995 BUDGET]. The new HUD administration has also emphasized the need to enhance housing conditions in existing HUD developments. *Id.* at 5-8, 20-21.

⁷ The *Gautreaux* housing program arose out of a 1966 lawsuit against HUD and the Chicago Housing Authority, which resulted in a finding of intentional racial segregation in Chicago public housing, and a regional desegregation remedy that was eventually upheld by the Supreme Court. *Hills v. Gautreaux*, 425 U.S. 284, 291 (1976); *see discussion infra* note 78. An important aspect of the *Gautreaux* remedy was the use of federal § 8 rental certificates, *see infra* note 37 and accompanying text, earmarked for use outside of areas of minority concentration, including the suburbs. *See* Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 *CHI.-KENT L. REV.* 451 (1988). The program has served about 5,000 families since 1976 (roughly one-half of whom have moved to suburban towns) and has now been extensively analyzed by social scientists.

program in additional cities.⁸ Recently, the Clinton administration issued an ambitious new executive order on fair housing⁹ that will seek to implement the duty, first enunciated in the Fair Housing Act of 1968,¹⁰ to “affirmatively further” fair housing in all federal housing programs.¹¹

The most widely distributed summary of the *Gautreaux* research, describing both employment and education benefits for former public housing residents who participated in the suburban rental certificate program was published in 1991, shortly before the Moving to Opportunity program was adopted. See James E. Rosenbaum, *Black Pioneers—Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 HOUSING POL’Y DEBATE 1179 (1991). See generally Roisman & Botein, *supra* note 4, at 336-37, for a useful summary of the *Gautreaux* research.

⁸ The “Moving to Opportunity Demonstration Program” provides new § 8 rental certificates and funding for regional housing counselling for participating families seeking suburban apartments. The program was created by § 152 of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3762 (1992). Program guidelines are set out at 58 Fed. Reg. 43,458 (1993). The cities selected for the Moving to Opportunity Demonstration include Baltimore, Boston, Chicago, Los Angeles and New York. The Moving to Opportunity program may soon be supplemented by the \$149 million “Choice in Residency” program, included in President Bill Clinton’s 1995 proposed budget for HUD, which, if fully funded, could provide housing mobility counselling for up to 300,000 additional families. See HUD FY 1995 BUDGET, *supra* note 6, at 17.

⁹ Exec. Order No. 12892, 59 Fed. Reg. 2939 (1994), entitled *Leadership and Coordination of Fair Housing in Federal Programs*. The executive order created a “President’s Fair Housing Council” and required, *inter alia*, promulgation of regulations to “describe the responsibilities and obligations” of executive agencies and program participants to affirmatively further fair housing. *Id.* at § 4-401. In an accompanying memorandum dated January 17, 1994, President Clinton directed the Fair Housing Council to develop a demonstration program that “will break down jurisdictional barriers in housing opportunities, and will promote the use of subsidies that diminish residential segregation” 59 Fed. Reg. 8513, 8514 (1994); see *infra* notes 99-100 and accompanying text.

¹⁰ Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1988 & Supp. IV 1992).

¹¹ All executive departments and agencies are required to “administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes” of the Fair Housing Act. 42 U.S.C. § 3608(e)(5) (1988). This duty extends, in theory, to local housing authorities administering HUD programs. See *Otero v. New York City Hous. Auth.*, 484

New efforts to promote housing desegregation, however, will face serious obstacles that are built into the current, locally based system of low-income housing administration. This system of local government control over assisted housing decisions has facilitated housing segregation¹² and is a component of the overall "jurisdictional fragmentation" that characterizes many American metropolitan areas.¹³ Examples at the state level include the widespread delegation of land use regulation to municipalities,¹⁴ state laws barring housing agencies from unilaterally placing public or assisted housing outside their geographic areas¹⁵ and laws specifically requiring permission of the local governing body for any assisted housing development.¹⁶ At the federal level, HUD has routinely

F.2d 1122 (2d Cir. 1973). For a useful discussion of cases decided under this section, see ROBERT SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* ch. 21 (1993).

¹² The historical role of federal government in creating and perpetuating segregated housing patterns has been amply described. See, e.g., Citizens Comm'n on Civil Rights, *The Federal Government and Equal Housing Opportunity: A Continuing Failure*, in *CRITICAL PERSPECTIVES ON HOUSING* (1986); JAMES A. KUSHNER, *APARTHEID IN AMERICA* (1979); MASSEY & DENTON, *supra* note 1, at 42-59. Yale Rabin has also described the role of local government in *Roots of Segregation in the Eighties: The Role of Local Government Actions*, in *DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION* (Gary A. Tobin ed., 1987). While these accounts focus primarily on affirmative government actions that have promoted segregation, they also implicitly provide support for a central thesis of this Article—that the localized system of low-income housing administration is itself a strong contributing factor to segregation. See also RUSK, *supra* note 5, at 33-35.

¹³ See Peter D. Salins, *Metropolitan Areas: Cities, Suburbs, and the Ties That Bind*, in *INTERWOVEN DESTINIES* (Henry Cisneros ed., 1993); see also RUSK, *supra* note 5.

¹⁴ See generally Florence Wagman Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 *CLEARINGHOUSE REV.* 312, 343 (1990); Salins, *supra* note 13, at 159-60.

¹⁵ See, e.g., CONN. GEN. STAT. § 8-39 (1993); N.Y. PUB. HOUS. LAW § 31 (McKinney 1989); IND. CODE ANN. § 36-7-18-41 (Burns 1989); ILL. ANN. STAT. ch. 310, para. 10/3, 17(b), 30 (Smith-Hurd 1993); MO. ANN. STAT. §§ 99.080, 99.320 (Vernon 1989).

¹⁶ See, e.g., CONN. GEN. STAT. § 8-120 (1993); N.Y. PUB. HOUS. LAW § 150 (McKinney 1989). The exclusionary potential implicit in such statutes is

deferred to such local restrictions,¹⁷ has added its own local notification and approval requirements for public housing development¹⁸ and has routinely approved or tolerated local residency preferences¹⁹ and other exclusionary practices.²⁰ Both federal and state laws encourage the proliferation of multiple housing agencies, even within the same housing market.²¹

The problems caused by local administration are exacerbated by the "voluntary" character of local housing responsibility. With the possible exception of New Jersey,²² low-income housing is not yet viewed as a routine municipal responsibility.²³ Instead, low-income housing is treated legally as a voluntary, local, civic

exemplified by cases like *Housing Authority of the Town of East Hartford v. Papandrea*, 610 A.2d 637 (Conn. 1992), where a local PHA sought to bar the state housing agency from administering portable rental certificates in the Public Housing Agency's ("PHA's") town.

¹⁷ For example, in the administration of the § 8 rental certificate program, HUD has required local PHAs to define the area in which they are "not legally barred" from operating and to limit use of certificates to that area. See 24 C.F.R. § 882.103 (1993).

¹⁸ 42 U.S.C. §§ 1437c(e), 1439(a-d) (1988 & Supp. IV 1992). See discussion *infra* notes 32-35 and accompanying text.

¹⁹ See, e.g., 24 C.F.R. § 882.209(a)(4) (1993) (§ 8); see discussion *infra* notes 46-50 and accompanying text.

²⁰ See *infra* notes 51-57 and accompanying text.

²¹ See, e.g., MASS. GEN. LAWS ANN. ch. 121b, § 3 (West 1989) ("There is hereby created, in each city and town in the commonwealth, a public body . . . known as the 'Housing authority' . . .") (creation subject to determination of need); CONN. GEN. STAT. § 8-40 (1993).

²² New Jersey may be unique in its adoption of mandatory inclusionary zoning laws that require (with exceptions) construction of a percentage of low-income housing in some communities. See N.J. STAT. ANN. §§ 52:27D-301-329 (West 1986 & Supp. 1994) (New Jersey Fair Housing Act). The New Jersey statute was adopted in response to the successful *Mount Laurel* litigation. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*). California also has a statutory scheme that commits local governments to build affordable housing in certain areas. See CAL. GOV'T CODE §§ 65580-65589.8, 65590 (West 1983 & Supp. 1994).

²³ See, e.g., *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1218-19 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); JAMES A. KUSHNER, *FAIR HOUSING* § 7.09 (1993).

endeavor.²⁴ Consequently, housing desegregation claims have usually been successful only in local jurisdictions that have already decided to build publicly assisted housing.²⁵ Thus, when segregated public housing is challenged, it is generally only public housing—within the jurisdiction where the housing is located—that will be integrated.²⁶ Also, under this voluntary system, federal housing funds are allocated only to local geographic areas that explicitly request assistance. Except for choosing among such requests, HUD generally has made no independent needs-based assessments of

²⁴ As one example, even the decision of whether to create a local housing agency to promote low-income housing is often statutorily delegated to the local level. *See, e.g.*, CONN. GEN. STAT. §§ 8-40 (1993); MASS. GEN. LAWS. ANN. ch. 121b, § 3 (West 1989) (creation of housing authority subject to local determination of need). One significant federal effort to impose federal housing obligations on local governments, as a condition of funding under the Community Development Block Grant Program, has often been unenforceable. *See, e.g.*, *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1034 (1978).

²⁵ Exclusionary zoning challenges can be an exception to this general observation when they are brought by a low-income housing developer to challenge exclusion of a project in a predominantly White community. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). Although such cases can reasonably be described as desegregation cases, they rarely include broad affirmative desegregation relief against the municipality, and usually require only that rezoning be permitted so that the project may go forward.

²⁶ The classic example of this problem is provided by the *Yonkers* case, *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). Because *Yonkers* had affirmatively sought out publicly assisted housing for one increasingly segregated corner of the city, its liability under the U.S. Constitution and the Fair Housing Act was clearly established, and a sweeping housing remedy order could be imposed—albeit limited to the boundaries of *Yonkers*. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). At the same time, nearby suburbs that had in the past taken virtually no responsibility for subsidized housing, faced no liability for racial discrimination or segregation in the absence of a specific development proposal.

where new housing dollars should be spent within segregated metropolitan regions.²⁷

This systematic delegation of control over publicly assisted housing to small governmental units forms the underlying legal structure of housing segregation.²⁸ This Article suggests that if HUD's ambitious desegregation agenda is to succeed, HUD must take steps to reverse its policies of deference to local governments and Public Housing Agencies ("PHAs")²⁹ on issues that may affect fair housing.³⁰ The discussion that follows describes the consequences of deferring to local prerogatives in several existing programs, and suggests a series of related principles to evaluate the

²⁷ See, e.g., 42 U.S.C. § 1439 (1988 & Supp. IV 1992); 24 C.F.R. pt. 791 (1993).

²⁸ Indeed, 42 U.S.C. § 1437 (1988 & Supp. IV 1992) openly declares that "[i]t is the policy of the United States . . . consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." However, as this Article suggests, this broad declaration has been superseded by Title VIII of the Civil Rights Act of 1968, which declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1988).

²⁹ "Public Housing Agencies" ("PHAs") are defined to include both local and statewide entities. See 42 U.S.C. § 1437a(b)(6) (1988 & Supp. IV 1992); 24 C.F.R. pt. 791 (1993). In this Article, the term PHA will be used primarily (unless otherwise noted) to refer to those local city- or town-based entities which are also commonly referred to under state law as public housing "authorities."

³⁰ This Article proceeds from the assumption that desegregation of government-assisted housing is a positive goal, and that it can be achieved in a manner that is consistent with the free housing choice of low-income families. The term "desegregation" is used specifically to refer to the process of reducing or eliminating the racial and economic isolation of low-income families in government-sponsored inner city enclaves. This Article does not address the debate over the merits of integration generally, see Derrick Bell, *Brown and the Interest-Convergence Dilemma*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 90 (Derrick Bell ed., 1980) (schools), nor does it address the relative value of regional desegregation versus equalization of housing and neighborhood conditions in low-income communities of color, see John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back to the Future Essay*, 71 N.C. L. REV. 1487 (1993). It is the author's view that efforts to improve housing and neighborhood conditions in low-income communities can coexist effectively with regional desegregation efforts.

likely success of current and future desegregation proposals.³¹

I. LOCAL DISCRETION IN PRACTICE

Broad local discretion in administering federal housing programs can conflict with efforts to successfully integrate housing. HUD regulations and policies in the following areas illustrate the segregative consequences of ceding too much control over federal housing policy to local government entities: (1) the provision of a municipal veto over federal public housing through local cooperation agreements; (2) the use of a voluntary housing allocation system, which can channel new housing funds in a pattern that enhances segregation; (3) the assigning of admissions functions to local PHAs; (4) an outmoded site selection policy for publicly assisted housing, which is based on local levels of racial segregation; and (5) the use of unnecessarily complicated procedures when federal rental certificate holders cross town lines to rent apartments.

A. Cooperation Agreements

The cooperation agreement³² is a prime example of

³¹ This Article is primarily concerned with desegregation of government-assisted housing programs. It should be noted, however, that much of the racial and economic segregation that dominates American metropolitan areas is a product of the private housing market and, although strongly influenced by governmental policies, remains relatively immune from systemic attack. Proposals to deter discrimination in the private housing market and influence private residential choices have included enhanced fair housing testing and enforcement; aggressive affirmative marketing programs; economic incentives to individual homeowners; and even a federal fair share housing plan tied to local property tax deductions, to name a few. See John C. Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993); Anthony Downs, *Policy Directions Concerning Racial Discrimination in U.S. Housing Markets*, 3 HOUSING POL'Y DEBATE 685 (1992). Yet, even the proponents of such proposals are skeptical about the possibility of significantly influencing private residential racial segregation. See, e.g., Boger, *supra*, at 1576-80. It may be that the best immediate opportunity for reducing racial and economic isolation in our society is through the aggressive desegregation of government housing programs.

³² 42 U.S.C. § 1437c(e).

congressional deference to local exclusionary policies. The cooperation agreement provision of the U.S. Housing and Community Development Act, most recently readopted in 1974,³³ requires local government approval before public housing may be developed within a jurisdiction, and requires separate local authorization for each specific project.³⁴ The stated purpose of the cooperation agreement requirement was to obtain local documentation of the need for low-income housing,³⁵ but, in practice, the law provides a standardless local veto over federally funded public housing.

Underlying the cooperation agreement requirement are the assumptions that public housing must be administered by local government entities, and that localities should not be forced to participate in federal housing programs. The practical effect of the cooperation agreement requirement has been to limit even small-scale public housing to jurisdictions that affirmatively seek it out. Thus, the cooperation agreement requirement has furthered segregation by limiting public housing resources to cities and towns with large existing low-income populations, and by permitting other localities to avoid public housing altogether.

B. Allocation of New Housing Funds

The demand for funds by local PHAs has largely driven the

³³ Pub. L. No. 93-383, 88 Stat. 633 (1974).

³⁴ Under 42 U.S.C. § 1437c(e), public housing funding for the local PHA is barred “unless the governing body of the locality involved has by resolution approved the application” for funds and has “entered into an agreement with the PHA providing for the local cooperation required by the secretary” Related provisions in the 1974 Act further require notification to local governments of applications for housing assistance within their borders, even where no local governmental involvement is otherwise necessary. *See* 42 U.S.C. § 1439(c).

³⁵ 42 U.S.C. § 1437c(e) (“In recognition that there should be a local determination of the need for low-income housing to meet needs not being adequately met by private enterprise . . .”). HUD’s implementing regulations also define the terms of the cooperation agreement beneficially, to include a commitment by the municipality to the long-term support of public housing, including a local property tax exemption and the nondiscriminatory provision of basic community services. 24 C.F.R. § 941.201(c) (1993).

allocation of federal housing funds.³⁶ Although HUD has the discretion to choose among local requests for housing assistance, it generally has not sought to locate housing in areas where no proposal has been made. Instead of encouraging the creation of more centralized statewide or regional entities capable of making reasonable determinations as to where housing should be built, Congress and HUD have fostered the development of duplicative local PHAs at the level of the smallest possible political subdivision.

Federal and state governments face strong pressures from housing advocates working on behalf of their clients and constituents to distribute government-assisted housing in a pattern that can result in enhanced economic segregation. Thus, urban housing advocates may press government agencies for more additional low-income housing assistance, while suburban housing advocates often seek funding for moderate-income "affordable housing," elderly housing and mortgage assistance programs designed primarily for moderate-income families. Federal and state governments have the responsibility to meet these pressures with a strong desegregation mandate. Cities should be assisted to retain and attract moderate-income families, and suburbs should be more strongly encouraged (or forced) to house low-income families seeking to live in less poverty concentrated areas.

The Section 8 rental certificate program illustrates this allocation problem. Section 8 is primarily a tenant-based program that enables low-income families to obtain housing in private apartments, and arranges for rent to be paid jointly by the tenant and the government.³⁷ Prior to 1990, many PHAs administering Section 8

³⁶ See generally 42 U.S.C. §§ 1437, 1439 (statutory authority for federal funding for public housing and § 8). Cf. 12 U.S.C. § 1715z-1 (1988 & Supp. III 1991) (§ 236 program); 12 U.S.C. § 1701q (Supp. III 1991) (§ 202 program).

³⁷ See generally 42 U.S.C. § 1437f (1988 & Supp. IV 1992). Some § 8 certificates are also attached to specific units, as part of the original housing rehabilitation or construction agreement (these "unit-based" or "project based" § 8 certificates are not directly discussed in this Article). Administration of § 8 certificate programs is delegated to local PHAs and governed by regulations set out at 24 C.F.R. pt. 882 (1993). Governed by 24 C.F.R. pt. 887, the closely related § 8 "voucher" program is being consolidated with the § 8 certificate program. See 58 Fed. Reg. 11,292 (1993); 59 Fed. Reg. 36,662 (1994).

programs did not permit certificate holders to move outside the geographic boundaries of the city or town receiving Section 8 funding. Thus, if a city resident sought to use Section 8 to rent a suburban apartment, her only option was to apply to the suburban PHA for a certificate.³⁸ However, such options were limited in areas where suburban PHAs controlled only a small number of certificates, or where few suburban PHAs existed.³⁹ In contrast, central city housing authorities had commonly sought and received thousands of rental certificates.⁴⁰ A strong city constituency for rental housing subsidies, along with lucrative administrative fees,⁴¹ provided ample incentive to apply for additional allocations of

³⁸ See Barbara Sard, *The Massachusetts Experience with Targeted Tenant-Based Rental Assistance for the Homeless: Lessons on Housing Policy for Socially Disfavored Groups, Part I*, 1 GEO. J. ON FIGHTING POVERTY 16, 24 & n.90 (1993) [hereinafter Sard I]. In the late 1970s and early 1980s, a limited exception to this rule could be found in a few city housing authorities experimenting with "interjurisdictional housing mobility programs." See SUBURBAN ACTION INSTITUTE, HOUSING CHOICE 143-60 (1980). These programs, like the less formal "swapping" of certificates between city and suburban PHAs, were dependent upon voluntary cooperation of suburban PHAs, and did not lead to significant housing mobility for low-income tenants.

³⁹ A different kind of allocation problem is presented where certificates are allocated at a disproportionately high rate to suburban jurisdictions. See Barbara Sard, *The Massachusetts Experience with Targeted Tenant-Based Rental Assistance for the Homeless: Lessons on Housing Policy for Socially Disfavored Groups, Part II*, 1 GEO. J. ON FIGHTING POVERTY 182, 211 n.129 (1994) [hereinafter Sard II]. In such a case, where city applicants are disadvantaged by local preferences, transportation difficulties and the lack of a unified regional application process, housing opportunities are likewise denied to central city residents. See discussion *infra* at notes 44-59 and accompanying text.

⁴⁰ For example, approximately 7,500 certificates and vouchers are currently assigned to Connecticut's three largest cities, with approximately 2,700 assigned to surrounding suburban PHAs. Allocation of federal § 8 certificates is governed generally by 42 U.S.C. § 1439 and 24 C.F.R. pt. 791 (1993).

⁴¹ The PHA administering a § 8 certificate receives a payment for each certificate at a monthly rate of 8.2% of the "fair market rent" level for the area. 42 U.S.C. § 1437f(q).

certificates.⁴² Today, the legacy of these policies is a concentration of Section 8 certificates in low-income, racially isolated neighborhoods.⁴³

HUD programs that rely on nonprofit housing sponsors suffer from a similar problem. Many nonprofit housing developers are located within areas where poor families already live. The strengths of urban nonprofit developers—their ties to local communities, and their familiarity with both the local real estate market and the local zoning approval process—have also tended to make them reluctant to enter new and potentially hostile territory outside of their well-defined catchment areas. At the same time, suburban nonprofit developers often have little incentive to take on costly and protracted zoning battles necessary to ensure that low-income housing gets built. Consequently, suburban nonprofit developers may be tempted to capitulate to local demands for discriminatory local residency preferences, higher tenant income levels, lower population densities and other exclusionary devices. Policymakers must address these built-in tendencies to perpetuate segregated housing patterns.

From a desegregation standpoint, low-income housing is most needed in jurisdictions where it is least wanted. But under a decentralized system of local PHAs operating in small geographic areas, PHA-based allocation of HUD housing funds within

⁴² Central city landlords are also part of the constituency for additional § 8 allocations, and to the extent that they are financially dependent on tenant-based § 8 subsidies, they form part of the resistance to further regionalization of the program.

⁴³ See Yale Rabin, *Redefining Low-Income Concentration: HUD's Regressive Site and Neighborhood Standards*, HOUSING POL'Y DEBATE (forthcoming 1994, manuscript on file with the *Journal of Law and Policy*) (citing M. LEGER & F.S. KENNEDY, ABT ASSOCIATES, FINAL COMPREHENSIVE REPORT OF THE FREESTANDING HOUSING VOUCHER DEMONSTRATION (1990)). The pattern of concentration of § 8 rental certificates was a central allegation in *Giddins v. HUD*, No. 91 Civ. 7181 (S.D.N.Y., filed Oct. 24, 1991) (alleging discriminatory administration of the § 8 program in Yonkers and Westchester Counties). See also *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1347, 1373 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181, 1191 (2d Cir. 1987) (cited in *Giddins Compl.* ¶ 35) (finding that the city's administration of the § 8 program contributed to concentration of minority families in southwest Yonkers).

metropolitan regions will likely continue to perpetuate segregation.

C. *Local Application and Admissions Policies*

As discussed above, HUD deference to local determinations of need often misallocates new housing funds to geographic areas that already have substantial concentrations of low-income housing. At the same time, HUD deference to local PHA application and admissions procedures can help make suburban-assisted housing inaccessible to central city residents. The result is a further geographical mismatch of needs and benefits.

Urban PHAs offer services that are often duplicated by neighboring PHAs. A typical central city PHA in the Northeast may be surrounded by multiple local PHAs, each with jurisdiction over its own geographic area.⁴⁴ These suburban PHAs are controlled by locally appointed boards and may employ dozens of staff members. They each administer separate wait-lists, run separate advertising, and recruit new tenants at their convenience. In essence, PHAs are the gatekeepers, to whom Congress has delegated the power to decide which poor families will live in each town.⁴⁵

Local residency preferences, administered by suburban

⁴⁴ The pattern described is prevalent in a number of northeastern states, including Massachusetts, Connecticut, New York and New Jersey. Massachusetts alone has over 300 local housing authorities, 125 of which operate a § 8 program. Sard II, *supra* note 39, at 211 n.129. In some states, like New York or Maryland, suburban § 8 programs are also divided along city-suburban lines, but often with a countywide PHA running the suburban program. See, e.g., *Comer v. Kemp*, 824 F. Supp. 1113 (W.D.N.Y.), *vacated in part, aff'd in part*, Nos. 93-6207, 93-6253, 93-6333 (2d Cir. Aug. 26, 1994).

⁴⁵ This delegation of control was not inadvertent. As the Senate committee observed, in proposing the § 8 program in 1974, “[t]he committee is firmly convinced that primary responsibility for carrying out [the program] should be vested in public housing agencies.” The committee expressed its “strong desire that as much decision making as possible be done on the local, as opposed to federal, level” and warned that “regulations abrogating the local decision making power” would be viewed with “strong disfavor.” S. REP. NO. 693, 93d Cong., 2d Sess. 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4314.

PHAs,⁴⁶ have been challenged as one of the more obvious mechanisms of suburban housing segregation.⁴⁷ Any policy that gives preference in admission to town residents effectively excludes equally qualified out-of-town residents, particularly where the number of qualified local applicants exceeds the number of available apartments.⁴⁸ Where there is a significant difference

⁴⁶ Residency preferences (which give priority in admission to applicants living or working in the PHA's jurisdiction) are generally permitted in federal housing programs, although they are usually subordinate to certain federally-required preferences. *See infra* note 48. Residency "requirements" and durational residency preferences are prohibited. *See, e.g.*, 24 C.F.R. § 882.517(e) (1993) (§ 8). Local residency preferences are required to be consistent with fair housing requirements, although until recently, HUD approval was not required before a PHA could implement local residency preferences, *see, e.g.*, 24 C.F.R. § 882.219(b)(4) (1993) (§ 8), and this author is unaware of any instance of HUD disapproval of a residency preference outside the context of a civil rights complaint. In 1994, the federal admissions regulations were amended to require HUD preapproval of residency preferences and to more explicitly require conformance with fair housing requirements. *See* 24 C.F.R. § 982.208, *in* 59 Fed. Reg. 36,662, 36,687 (1994); *see also* 59 Fed. Reg. 36,616 (1994). However, as HUD acknowledges, the new rule suffers from a "lack of stated criteria to be used for disapproving residency preferences," 59 Fed. Reg. at 36,619, and accordingly, HUD has initiated separate rule making to develop more specific procedures and criteria to assess the impact of residency preferences. *Id.*

⁴⁷ In *Secretary v. Melrose Housing Authority*, No. HUDALJ 01-92-0175-1 (HUD 1993), for example, a HUD administrative law judge found reasonable cause that a suburban residency preference discriminates and perpetuates segregation based on race, where the town's population was 97% White, and where a significant discrepancy existed between the percentage of minority families in the § 8 program and the percentage of minority families on the wait-list. A similar federal case, *Comer v. Kemp*, challenges, in part, the discriminatory effect of suburban residency preferences on low-income minority tenants in the Buffalo area.

⁴⁸ The most extreme effects of local residency preferences may have been tempered, at least within the § 8 program, by the requirement of "federal preferences," which require PHAs to give priority to the most needy applicants, including families who are involuntarily displaced, families who are homeless or living in substandard housing and families paying more than 50% of their income for rent. 24 C.F.R. § 882.517 (1993). Depending on the geographic area, these rules can give some countervailing priority to central city residents who apply to suburban programs, although HUD permits local PHAs to give priority to local residents within the federal preference system (giving priority, for example,

between the racial makeup of the PHA's town and the housing market as a whole, residency preferences have a discriminatory impact on minority applicants and perpetuate segregation, in violation of the Fair Housing Act.⁴⁹ HUD approval of such policies also violates the agency's duty to affirmatively further fair housing under the Act.⁵⁰

The effect of discretion vested by HUD in small suburban PHAs over day-to-day admissions procedures, although less obvious than the effect of explicit residency policies, may be just as important to the pattern of metropolitan segregation. Whether intentionally or unknowingly, local administrators can build a pattern of segregation cumulatively over time with a series of small and seemingly benign acts. For example, in the administration of the Section 8 program, local PHA staff members may exercise discretion in making upward adjustments to allowable rent payments,⁵¹ extending the initial certificate period during a family's housing search,⁵² and determining and weighing an applicant's federal preference status.⁵³ Each of these discretionary actions, if exercised in favor of a local resident, can have a

to a suburban resident in substandard housing over a nonresident in substandard housing). The federal preferences have been weakened by recent statutory and regulatory amendments that permit local PHAs to disregard federal preferences for a significant percentage of units outside the § 8 certificate program (50% of public housing units, 30% of § 8 moderate rehabilitation units, etc.). *See* 59 Fed. Reg. 36,616 (1994).

⁴⁹ *See Melrose Hous. Auth.*, No. HUDALJ 01-92-0175-1; *cf. In re Township of Warren*, 622 A.2d 1257 (N.J. 1993). *See generally* Roisman & Tegeler, *supra* note 14, at 315-25 (discriminatory impact).

⁵⁰ Surprisingly, until recently, local residency preferences had been routinely approved by HUD, even for predominantly White towns in highly integrated housing markets. Although HUD's pending rule making, *see* 59 Fed. Reg. at 36,619, and its recent administrative decision in *Secretary v. Melrose Housing Authority*, No. HUDALJ 01-92-0175-1, may signal a new willingness on the part of the agency to reexamine the discriminatory effects of local residency preferences, HUD has not yet proposed any general elimination of the use of residency preferences by local PHAs and has actually continued to defend residency preferences (through the Department of Justice) in the *Comer* case.

⁵¹ 24 C.F.R. § 882.106(a)(2) (1993).

⁵² 24 C.F.R. § 882.209(d) (1993).

⁵³ 24 C.F.R. § 882.219(b)(2)(iii) (1993).

discriminatory effect. Likewise, even the most scrupulous of local PHAs are not immune from referrals from local politicians or landlords and similar acts of rule bending that may benefit local residents. Other local practices may include frequent purging of names from wait-lists without adjusting for the high rate of mobility of central city applicants, and requiring applicants to personally appear at the PHA office to pick up or fill out applications.⁵⁴ Failure by suburban PHAs to engage in affirmative marketing to attract out-of-town applicants⁵⁵ and differential treatment by PHA staff in the degree of housing search assistance offered to individual applicants⁵⁶ may also contribute to further segregation.⁵⁷ Indeed, the very existence of multiple separate housing authorities, with separate physical locations, wait-lists and admissions procedures, is increasingly recognized as a discriminatory barrier to access to housing benefits for low-income minority families.

Differential treatment of out-of-town minority families may be very difficult to detect without testing.⁵⁸ In fact, such disparate treatment may not even be consciously "noticed" by the suburban Section 8 administrator. Yet, over time, a recognizable pattern may evolve: a predominantly White group of certificate holders alongside a predominantly minority wait-list, in a low-income

⁵⁴ In recognition of this problem, particularly as it affects persons with disabilities, the HUD regional director for Region I recently suggested that local PHAs in Massachusetts mail applications to prospective tenants.

⁵⁵ HUD, PUBLIC HOUSING AGENCY ADMINISTRATIVE PRACTICES HANDBOOK FOR THE SECTION 8 EXISTING HOUSING PROGRAM, No. 7420.7, ch. 9 (1983).

⁵⁶ 24 C.F.R. § 882.103(a) (1993).

⁵⁷ Barbara Sard describes a number of these "bureaucratic obstacles" in the context of access to housing by "socially disfavored groups" (such as the homeless) in Massachusetts. Sard II, *supra* note 39, at 192-93. Sard also identifies practices such as closing of wait-lists, limiting of time periods for accepting new applications, violation of federal preference rules, unlawful use of "tenant suitability" factors in screening, and informal telephone practices used to discourage applications. Sard II, *supra* note 39, at 192-93.

⁵⁸ Fair housing testing involves a staged housing search, usually under the supervision of an attorney or fair housing agency, by one or more persons posing as potential renters or home buyers to collect evidence and determine whether discrimination is being practiced. *See generally* SCHWEMM, *supra* note 11, at § 32.2.

housing market that is largely Black and Latino. In the context of multiple local PHAs, with differing political allegiances and social agendas, HUD's traditional reliance on the threat of Title VIII or Title VI investigation and enforcement⁵⁹ will continue to be an ineffective means of promoting housing choice and racial integration on a large scale.

D. Site Selection

HUD's "site and neighborhood" regulations,⁶⁰ which govern location of public and assisted housing projects, also demonstrate the segregative effects of a highly localized federal housing policy. The regulations, originally adopted in response to the 1970 decision in *Shannon v. HUD*,⁶¹ essentially require that new assisted housing be located outside of "area[s] of minority concentration."⁶² Ironically, however, HUD has in the past interpreted these

⁵⁹ Title VI of the Civil Rights Act of 1964 bars "discrimination under any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d (1988). HUD procedures for receipt and investigation of complaints under Title VI are set out at 24 C.F.R. § 1.1 - 1.12 (1993). HUD procedures for Title VIII complaints are set out at 42 U.S.C. § 3610 (1988).

⁶⁰ See, e.g., 24 C.F.R. § 941.202(c) (1993) (public housing development); 24 C.F.R. § 880.206(c) (1993) (§ 8 new construction). Each HUD multifamily program includes site selection regulations.

⁶¹ 436 F.2d 809 (3d Cir. 1970). In *Shannon*, the Third Circuit required HUD to adopt procedures to evaluate the racial impact of new housing sites, in light of HUD's obligation to affirmatively further fair housing. HUD's first site selection regulations followed two years later. A helpful history of the site and neighborhood regulations is set out in Michael Vernarelli, *Where Should HUD Locate Assisted Housing?* in HOUSING DESEGREGATION AND FEDERAL POLICY (John M. Goering ed., 1986).

⁶² According to 24 C.F.R. § 941.202(c)(1) (1993):

[t]he site for new construction projects must not be located in . . . [a]n area of minority concentration unless (i) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area.

Accord 24 C.F.R. § 880.206(c) (1993) (§ 8 new construction); see also 24 C.F.R.

regulations so leniently, that in many instances, local PHAs have been permitted to locate a significant portion of assisted housing in racially concentrated neighborhoods.⁶³ Prior to 1993, HUD's approach to determining whether a neighborhood was "minority concentrated" was simply to compare the racial makeup of the neighborhood (usually a census tract) with the racial makeup of the PHA's area of jurisdiction. Thus, if the neighborhood had a higher minority population percentage than the PHA's area, HUD defined the neighborhood as an area of minority concentration.⁶⁴ But because few central city PHAs have been given permission to operate in the suburbs, the "jurisdiction" of the PHA is often limited to the boundaries of the city.

Predictably, HUD's approach tended to create a higher percent definition of minority concentration than a regionally-based definition, particularly in cities that are racially separate from their suburbs.⁶⁵ This approach permitted low-income housing to be

§ 941.202(c)(2) ("racially mixed" areas). For public housing development not involving new construction, the regulations require that the location chosen must "further . . . compliance" with Title VIII. 24 C.F.R. § 941.202(b) (1993). The site and neighborhood standards also require that potential housing sites "must promote a greater choice of housing opportunities by avoiding areas that contain (or would contain if the housing were approved for assistance) an undue concentration of poverty-level population, as determined under 24 CFR part 770." 24 C.F.R. § 941.202(d) (1993); *see also* 24 C.F.R. pt. 770 (1993).

⁶³ A full attempt to explain the failure of the site and neighborhood standards is beyond the scope of this Article. Among the reasons are the city-based definition of minority concentration, discussed above; the failure to place any new units outside of the area of PHA jurisdiction; the deference accorded to local PHAs to decide what constitutes a neighborhood for purposes of the standards; the overly broad and unenforceable standards for housing developed through rehabilitation or acquisition; and the prior interpretation of 24 C.F.R. § 941.202(c) (and similar standards) by HUD to permit one-half of the proposed units in an allocation to be located inside areas of minority concentration. *See Rabin, supra* note 43.

⁶⁴ This policy was formalized in HUD NOTICE No. H-81-2 (1981). Prior to 1981, HUD had sometimes used a uniform 40% figure to measure minority concentration, which had a similar segregative effect. The uniform approach was submitted as a proposed regulation during the Carter administration, but never adopted. *See Vernarelli, supra*, note 61.

⁶⁵ *See, e.g., RUSK, supra*, note 5, at 77 (Table 2.20) (cities with 45%-82% minority populations).

located in neighborhoods with significant minority populations, and also contributed to racial segregation by making central cities more racially concentrated in relation to the suburbs with each new housing unit.⁶⁶ HUD's prior site selection policies have led to calls for a regionally-based approach to defining "areas of minority concentration."⁶⁷

E. Section 8 Portability Administration

In 1987, Congress made a potentially far-reaching change to the Section 8 rental certificate program by guaranteeing all certificate holders the right to move across local boundaries to rent apartments.⁶⁸ The 1987 legislation⁶⁹ provided families receiving Section 8 certificates with the right to use their rental certificates in any town in their region, as long as the private apartments they wished to rent were below the federally established fair market rent level.⁷⁰ Congress later expanded the statute to permit statewide

⁶⁶ This policy has also led to a predictable inconsistency among cities. For example, an area of minority concentration in Providence, Rhode Island was defined as 21.5%, based on 1980 citywide data, in *Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637, 641 (D.R.I. 1991); in Bridgeport, Connecticut, the citywide percent minority is 50%; in Baltimore, Maryland, 60%. See RUSK, *supra* note 5, at 77. The definition of minority concentration may also shift from decade to decade, because it is based on U.S. Census data. For example, a census tract that was "minority concentrated" under the 1980 census may no longer be concentrated in 1990, if the citywide growth in minority population outpaced the growth in that tract.

⁶⁷ See, e.g., Rabin, *supra* note 43 (proposing that the metropolitan area should be recognized as the relevant housing market for purposes of calculating existing neighborhood concentrations by income and race).

⁶⁸ Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 145, 101 Stat. 1877 (codified at 42 U.S.C. § 1437f(r)). The statute provided that § 8 recipients could move to eligible units within the same, or contiguous "metropolitan statistical area" as the PHA issuing the certificate.

⁶⁹ The implementation of the 1987 amendment was delayed at least three years by HUD's failure to notify local PHAs of their obligations, until forced by litigation and threatened litigation. See, e.g., *Smith v. HUD*, No. 89-0612L (D.R.I., Consent Decree filed Jan. 19, 1990).

⁷⁰ 42 U.S.C. § 1437f(c)(1).

housing choice for Section 8 families.⁷¹ On its face, the 1987 amendment appeared to be a direct effort to accomplish one original legislative purpose of the Section 8 program: to promote regional housing opportunities.⁷²

However, in specifying the administrative arrangements that would govern the new "portability" rule, Congress continued its deference to local government prerogatives by requiring that administration of the Section 8 certificate be transferred to the PHA in the town to which the family moves.⁷³ The complicated resulting administrative arrangements, which HUD later enumerated in detail,⁷⁴ create serious disincentives for central city PHAs to

⁷¹ Pub. L. No. 101-625, § 551, 104 Stat. 4079 (1990). The statute was subsequently amended in 1992 to require a one-year waiting period for nonresidents prior to moving out of the issuing jurisdiction. Pub. L. No. 102-550, § 147, 106 Stat. 3672 (1992).

⁷² The § 8 certificate program is authorized "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing. . ." 42 U.S.C. § 1437f(a); *see also* Pub. L. No. 93-383, 88 Stat. 633 (1974) (the Housing and Community Development Act of 1974), which includes the congressional finding that "the concentration of persons of lower income in central cities" is a significant contributing factor to "critical social, economic, and environmental problems" in the nation's cities, § 101(a)(1), and lists as a specific objective of the Act "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income . . ." § 101(c)(6).

⁷³ According to 42 U.S.C. § 1437f(r)(2) (1993):

[t]he public housing agency having authority with respect to the dwelling unit to which a family moves under this subsection shall have the responsibility of carrying out the provisions of this subsection with respect to the family. If no public housing agency has authority with respect to the dwelling unit to which a family moves under this subsection, the public housing agency approving the assistance shall have such responsibility.

If the sending PHA has authority to administer certificates in the receiving town, no transfer of administration is required.

⁷⁴ In implementing the new rule, HUD required local PHAs to follow preexisting regulations for program administration and fee sharing. These regulations require central city PHAs to transfer the administration of city rental certificates to suburban PHAs, including transfer of 80% of the lucrative § 8

aggressively pursue regional mobility⁷⁵ and subject families on the program to the unnecessary additional obstacle of dealing with two PHA bureaucracies if they wish to move.

II. CHANGING THE GROUND RULES

As HUD moves forward with a challenging housing integration agenda, it should at least attempt to avoid the obstacles to integration that are built into its tradition of deference to local agencies and local decision-making. HUD can accomplish this by adopting housing desegregation policies that (1) do not require suburban government participation; (2) deemphasize new housing construction; and (3) increase the use of regional entities to implement desegregation goals.

A. Housing Integration Programs Should Avoid Suburban Government Participation

HUD's reliance on local housing authorities, as demonstrated in the programs previously discussed, often contributes to segregation. Although the federal government has traditionally favored placing direct responsibility in local PHAs, this deference can and should be abrogated when reliance on local programs conflicts with fair housing goals.⁷⁶ At the very least, HUD should sharply curtail the

administrative fee for every city certificate used in a suburb where another PHA has jurisdiction. See HUD NOTICE No. 90-43 (1990), replaced by HUD NOTICE No. 91-19 (1991), referencing 24 C.F.R. pt. 887 (1993). HUD has also issued proposed regulations governing portability. 58 Fed. Reg. 11,292 (1993).

⁷⁵ As Alexander Polikoff, among others, has observed, this system of shared administration and forfeiting of lucrative administrative fees "creates a 'vested interest' in housing authorities to retain participating families within their jurisdictions and thereby realize the administrative fees the certificates or vouchers represent." POLIKOFF, *supra* note 4, at n.51.

⁷⁶ According to 42 U.S.C. § 1437 (1990), it is "the policy of the United States . . . consistent with the objectives of this chapter," to vest responsibility in local public housing agencies. Thus, where delegation to local PHAs clearly conflicts with other purposes or findings of the U.S. Housing Act or the Fair Housing Act, it becomes HUD's obligation to abrogate local authority. See 42 U.S.C. § 3601 (policy of the United States to provide "for fair housing

initial "decision-making" functions of PHAs, including decisions about how much additional housing is needed in a municipality, where it should be located and who should live there. A more appropriate role for local PHAs could be the administration of programs and tenants that are already in place.⁷⁷

The *Gautreaux* housing mobility program in Chicago, which places low-income families throughout the region, has been highly successful, in part because it does not involve suburban PHAs in decisions about which families and how many families may live in suburban towns.⁷⁸ It should be possible to duplicate the regional

throughout the United States"); 42 U.S.C. § 1437f(a) (purpose of § 8 program includes "promoting economically mixed housing"); see also Pub. L. No. 93-383, §§ 101(a)(1), 101(c)(6), 88 Stat. 633 (1974) (purpose of Housing and Community Development Act includes "spatial deconcentration of housing opportunities for persons of lower income.").

⁷⁷ Local housing authorities undoubtedly perform many functions superlatively. But some of the strengths of local PHAs—their understanding of "local needs," their grounding in the local political structure, their close contacts with local landlords, and their accountability to local voters, make PHAs less than suitable vehicles to accomplish housing integration.

⁷⁸ Under the *Gautreaux* program, the Leadership Council for Metropolitan Open Communities, operating as a regional PHA, places families directly with suburban landlords, and then generally transfers administration of a family's § 8 certificate to the local PHA, if one exists. The *Gautreaux* program's regional mandate arises out of the original *Gautreaux* court decision. After HUD and the Chicago Housing Authority ("CHA") were found liable for housing discrimination, the Seventh Circuit Court of Appeals concluded that, because of the high concentration of low-income and minority families in Chicago, "a city-only remedy will not work." *Hills v. Gautreaux*, 425 U.S. 284, 292 (1976) (quoting 503 F.2d at 936-37). The Supreme Court also upheld the Seventh Circuit's recommendation of a regional remedy, despite the absence of suburban municipalities and PHAs as defendants. *Id.* at 297. Distinguishing *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court reasoned that a metropolitan order "will not necessarily entail coercion of uninvolved governmental units, because CHA and HUD have the authority to operate outside the Chicago city limits," and that local government involvement is not necessary for HUD administration of the § 8 program. 425 U.S. at 298. Similarly, in *NAACP v. Kemp*, 721 F. Supp. 361, 368 (D. Mass. 1989), the federal district court in Massachusetts interpreted *Hills v. Gautreaux* as authorizing suburban relief based on HUD liability, without suburban government participation in the lawsuit. The consent decree in *NAACP v. Kemp* included, *inter alia*, an allocation of portable § 8 certificates earmarked for suburban use, and a regional clearinghouse for suburban rental listings.

scope of the *Gautreaux* program without bringing additional federal lawsuits. For example, as an alternative to traditional administration of the Section 8 program, HUD could begin to administer new housing mobility programs directly⁷⁹ or through regional nonprofit agencies.⁸⁰ This approach has the added advantage of avoiding state laws that bar housing development by PHAs across town lines. Similarly, HUD could increase its reliance on state housing agencies⁸¹ to administer programs directly in suburban jurisdictions.⁸² As HUD moves forward with second generation *Gautreaux* programs such as the new "Choice in Residency" proposal,⁸³ it should give serious consideration to administering these programs outside the existing local PHA structure.⁸⁴

⁷⁹ Direct HUD administration of § 8 programs is authorized by 42 U.S.C. § 1437f(b), and by 24 C.F.R. § 882.121 (1993) if no PHA is "able and willing" to administer a particular allocation of certificates.

⁸⁰ PHAs eligible to operate § 8 programs may include "[a]ny state, county, municipality or other governmental entity or public body (or agency or instrumentality thereof)." 24 C.F.R. § 882.102 (1993).

⁸¹ HUD's definition of PHAs eligible to receive allocations of certificates includes state agencies, 24 C.F.R. § 882.102 (1993), and state agencies have been used successfully to administer § 8 programs. *See* Sard II, *supra* note 39, at 192; N.J. STAT. ANN. § 52:27C-24 (West 1986 & Supp. 1994); *see also* Housing Auth. v. Papandrea, 610 A.2d 637 (Conn. 1992).

⁸² Barbara Sard's experience in Massachusetts is strongly supportive of this approach. *See* Sard II, *supra* note 39, at 191 ("[T]he potential of tenant-based rental assistance programs to better serve members of socially disfavored groups is undercut when the programs are administered by local housing authorities, rather than by regional agencies under the supervision of the state housing agency."). *See also* Rabin, *supra* note 43.

⁸³ The ambitious "Choice in Residency" program proposed in President Clinton's 1995 budget would allocate an additional 45,000 low-income rental housing certificates and \$149 million in housing counselling grants to help up to 300,000 families "living in areas with high concentrations of poverty or racial separation have a real opportunity to move to other neighborhoods." HUD FY 1995 BUDGET, *supra* note 6, at 17. In light of the principles discussed above, the new program's prospects for success may in part depend on what types of entities are selected to administer the program, and whether the certificates used are specially earmarked for regional use, without the usual administration and fee sharing that plagues the current program.

⁸⁴ The legislation initially submitted to Congress by HUD in 1994 is promising in this regard. *See* Housing Choice and Community Investment Act

A related approach could involve the transformation of every Section 8 tenant-based certificate program into a regional housing mobility program.⁸⁵ Such a proposal might require every central city PHA to provide a basic package of regional mobility services,⁸⁶ with HUD encouraging central city PHAs to assist families seeking to move to suburban towns. In particular, HUD could counter current disincentives to regional mobility by providing financial incentives to PHAs that assist tenants in integrative moves.⁸⁷

B. Housing Integration Programs Should Avoid New Construction

New low-income housing construction is undoubtedly a crucial element in any government housing strategy, particularly in metropolitan areas with severe shortages of low cost housing. However, despite its merits in expanding the overall supply of low-income housing, new construction may be the least effective approach to achieving significant housing desegregation. New construction is too slow, too dependent on suburban government

of 1994, H.R. 4310, 103d Cong., 2d Sess. § 411 (1994) (nonprofit organizations eligible for Choice in Residency grants).

⁸⁵ See POLIKOFF, *supra* note 4, at 16; Roisman & Botein, *supra* note 4, at 350-51.

⁸⁶ See Roisman & Botein, *supra* note 4, at 339-44. Mobility plans, like one adopted in Hartford, Connecticut in 1990, can include, at a minimum, multiple written and oral notification to clients of their mobility rights, regular collection and posting of suburban rental listings, dissemination of information about suburban transportation and services, outreach to suburban landlords and referral of discrimination complaints. See Roisman & Botein, *supra* note 4, at 339-44.

⁸⁷ HUD already possesses funding authority to assist central city PHAs in this regard. "The Secretary may increase the fee if necessary to reflect the higher costs of administering . . . programs operating over large geographic areas," and authorize additional payments to PHAs for "the costs incurred in assisting families who experience difficulty (as determined by the Secretary) in obtaining appropriate housing." 42 U.S.C. § 1437f(q)(1). Furthermore, 42 U.S.C. § 1437f(r)(3) addresses the fear some PHAs may have about loss of certificates, by explicitly requiring HUD to give "consideration to any reduction in the number of resident families incurred by a public housing agency in the preceding fiscal year" in determining new allocations of § 8 certificates.

cooperation and, although it can generate landmark lawsuits,⁸⁸ new construction is unlikely to produce a sufficient number of units for desegregation purposes.⁸⁹

Proposing new construction in a suburban town is ineffective as a housing integration strategy because it guarantees suburban government involvement in the decision-making process. Although most towns no longer explicitly exclude multifamily housing in local zoning ordinances, local zoning approval is usually required for any change in housing density, and local governments possess a wide variety of discretionary bases for disapproving such housing. For these reasons, regional housing desegregation efforts will continue to rely heavily on the use of rental certificates for the majority of integrative moves.⁹⁰

Another promising housing integration strategy would rely on acquisition and rehabilitation of existing housing in suburban communities, which generally require no zoning or other land use permits. Housing acquisition is a valuable and underutilized method of expanding low-income housing opportunities in predominantly White, middle class communities. Existing housing acquisition and integration programs have focused on one- and two-family homes,

⁸⁸ For example, the case of *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), was an extremely important exclusionary zoning precedent in the Second Circuit, but has not yet created any units of housing, primarily because of the extensive delays caused by the litigation. In Connecticut, the two major exclusionary zoning lawsuits decided since 1988 in the Connecticut Supreme Court, both involving new housing, will directly result in no more than 11 units of housing. See *West Hartford Interfaith Coalition v. Town Council*, 636 A.2d 1342 (Conn. 1994); *Builders Serv. Corp. v. Planning & Zoning Comm'n*, 545 A.2d 530 (Conn. 1988).

⁸⁹ This is particularly true in an era when low-income housing is being increasingly developed on a scattered site basis, and every small development has the potential to generate an expensive zoning battle and years of litigation. See, e.g., *West Hartford Interfaith Coalition*, 636 A.2d at 1342.

⁹⁰ See also *Sard II*, *supra* note 39, at 196 (tenant-based assistance gives greater access to homeless families); *MASSEY & DENTON*, *supra* note 1, at 231. In the Hartford area, for example, although few low-income suburban units have been created through new construction since 1990, almost 400 city families with § 8 rental certificates have moved to suburban towns under the city's regional housing mobility program.

condominiums and even small apartment buildings.⁹¹ HUD should adapt its rules to permit more frequent use of this strategy.⁹²

C. State and Federal Housing Programs Must Be Regionalized

Planning for the location of housing, projecting housing need, and identifying families most in need, all should occur on a regional basis. In contrast, housing programs that are divided up on a town-by-town basis are destined to misallocate resources. There is no requirement, however, that the "Public Housing Agencies" that HUD contracts with will be limited to PHAs in specific towns. In fact, ample precedent already exists for regional entities, such as regional nonprofit agencies, to administer HUD programs.⁹³ HUD should take steps to affirmatively encourage the development of such entities in areas where they do not exist,⁹⁴ and give regional agencies priority in future funding awards.⁹⁵

By promoting and delegating housing responsibility to regional PHAs or nonprofit agencies, HUD would consolidate duplicative program functions, which are now handled inefficiently by separate staff at multiple local PHAs. Enforcement would also be

⁹¹ See *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577, 1582 (S.D.N.Y. 1986) (housing remedy order authorizing "purchase and/or lease . . . of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers"); Roisman & Botein, *supra* note 4, at 348 (single family homes in New Haven, Connecticut and Cleveland, Ohio).

⁹² The major danger in such a strategy is the risk of involuntary displacement of low-income existing suburban residents from marginal multifamily properties. To avoid such displacement, safeguards (such as noneviction requirements or priority to vacant, abandoned or commercial property) need to be in place before a large scale acquisition strategy is attempted.

⁹³ See Sard II, *supra* note 39, at 192.

⁹⁴ For example, if the proposed "Choice in Residency" program is funded by Congress, HUD should consider using the program as a vehicle to create new regional organizations to compete with local PHAs for the administration of § 8 certificates. Cf. 58 Fed. Reg. 68,000 (1993) (Fair Housing Initiatives Program announcement, encouraging creation of new fair housing organizations in under-served areas).

⁹⁵ See also RUSK, *supra* note 5, at 85-102 (advocating development of regional government structures through city-county consolidation, direct annexation and other methods).

streamlined, with potential regionwide remedies imposed against entities with regional jurisdiction and operations.⁹⁶

HUD has already unveiled one such regionalization proposal, at the 1994 HUD Fair Housing Summit—a *Metropolitan Areawide Fair Housing Strategy*.⁹⁷ This proposal was described in President Clinton's 1994 memorandum accompanying the new executive order on fair housing,⁹⁸ to include "a one-stop, metropolitan areawide fair housing opportunity pilot program that will effectively offer Federally assisted housing, Federally insured housing, and private market housing within a metropolitan area to all residents of the area."⁹⁹ It remains unclear, however, what the program's relationship with local PHAs and other assisted housing providers in a region would be. For the reasons discussed earlier, if the pilot program requires voluntary cooperation from suburban PHAs, it is unlikely to achieve its potential.¹⁰⁰

⁹⁶ See, e.g., *Giddins v. HUD*, No. 91 Civ. 7181 (S.D.N.Y., Consent Decree dated Aug., 1993) (countywide § 8 mobility program ordered in lawsuit against HUD, state housing agency, local PHA, and countywide § 8 administrator).

⁹⁷ See HUD, *THE NATIONAL FAIR HOUSING SUMMIT: FINAL REPORT OF PROCEEDINGS W-62* (1994).

⁹⁸ 59 Fed. Reg. 8513 (1994).

⁹⁹ *Id.* at 8514. This directive was also reflected in President Clinton's proposed 1995 budget, which included \$24 million for the program. HUD FY 1995 BUDGET, *supra* note 6, at 18. The pilot program is apparently designed to address the important problem of exclusion of out-of-town residents that is built in to any housing program with multiple sites, separate waiting lists and separate administrative staffs scattered throughout the metropolitan area. An unofficial description of the areawide strategy proposed placing all housing applicants on "all waiting lists for all assisted housing programs" in the region, and listing all housing openings in a central regional clearinghouse. HUD, *THE NATIONAL FAIR HOUSING SUMMIT: FINAL REPORT OF PROCEEDINGS* (1994). It is also promising that, in the original proposal, HUD plans to rely on private nonprofit organizations, rather than existing PHAs, to "coordinate the region's tenant selection, assignment, and counseling services." HUD FY 1995 BUDGET, *supra* note 6, at 18.

¹⁰⁰ The initial demonstration version of the metropolitanwide waiting list proposal suffered from this very flaw. See Housing Choice and Community Investment Act of 1994, H.R. 4310, § 601 ("Metropolitan Areawide Strategy Demonstration" is a three-city demonstration to be funded in regions where "a sufficient number of units of general local government, public housing agencies, and private owners of assisted housing are committed to participate.").

CONCLUSION

The federal government should reexamine its tradition of delegating responsibility and deferring to local housing authorities, in light of the current system's tendency to promote segregation. By permitting suburban government involvement in decisions affecting the location and occupancy of low-income housing, HUD risks the exclusion of new housing and invites adoption of preferences and practices that may exclude families with the greatest need. By limiting or regionalizing local PHA "gatekeeping" functions and by expanding the use of other public and private entities to achieve its fair housing goals, HUD may be able to maintain its preference for local administration while at the same time enhancing prospects for regional desegregation.