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IN DEFENSE OF A LIBERAL CHOICE-BASED APPROACH TO RESIDENTIAL SEGREGATION

W.C. Bunting

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IN DEFENSE OF A LIBERAL CHOICE-BASED APPROACH TO RESIDENTIAL SEGREGATION

W.C. BUNTING, J.D., PH.D.*

I.	INTRODUCTION.....	336
II.	BACKGROUND.....	338
	A. <i>Integration Mandate</i>	339
	B. <i>Theoretical Framework</i>	343
III.	INVOLUNTARY RESIDENTIAL SEGREGATION	345
	A. <i>Keeping People In</i>	345
	1. Direct Force	346
	2. Indirect Force	347
	B. <i>Keeping People Out</i>	349
	1. Direct Force	349
	2. Indirect Force	351
IV.	VOLUNTARY RESIDENTIAL SEGREGATION	353
	A. <i>Socially-negative Voluntary Residential Segregation</i>	354
	1. Segregation as a Response to a Hostile Environment.....	354
	2. Policy Responses	357
	B. <i>Socially-positive Voluntary Residential Segregation</i>	360
	1. Social Benefits of Location-based Communities	360
	2. The Problem of Voluntary Residential Segregation	367
	3. Outcome-based Policy Responses.....	371
	a. <i>Social Objective Function Ill-defined</i>	371
	b. <i>Problems of Scale</i>	373
	c. <i>Substituting Public Preferences for Private Preferences</i>	375
	4. Choice-based Policy Responses	383
	a. <i>Eliminate Restrictions on the Choice Set</i>	383
	b. <i>Expand the Choice Set</i>	384
	c. <i>Modify the Choice Set</i>	387
	C. <i>A Choice-based Case Against Gentrification</i>	390
	1. Socially-negative Gentrification.....	390
	2. Socially-positive Gentrification	393

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V. CONCLUSION 398

This Article argues that not all forms of residential segregation are alike. Certain patterns of residential segregation can be distinguished along two key dimensions: (1) voluntariness; and (2) net social impact. Voluntary residential segregation is largely incompatible with outcome-based policies designed to promote residential integration. This Article claims that the existence of voluntary spatial clustering implies that the government must adopt an ex ante choice-based approach to residential integration that seeks to protect and enable freedom of choice in housing rather than an ex post outcome-based approach that seeks to implement and maintain specific patterns of residential segregation. The central thesis of this Article is that the FHA mandate to “affirmative further fair housing” (AFFH) is properly interpreted as a responsibility to promote fair housing choice, as a duty to understand in which local communities those in need of affordable housing truly want to live, and an obligation to expand or modify the set of affordable housing choices to encompass as many of these desired locations as is fiscally possible, and not as an outcome-based mandate to site affordable housing in a limited number of areas that best implements certain patterns of residential integration deemed socially optimal by otherwise well-meaning policy elites.

I. INTRODUCTION

The Article proceeds as follows: Part II considers the legal and statutory justification for the U.S. Housing and Urban Development Department’s (“HUD”) mandate to promote residential integration: The Fair Housing Act (the “FHA”) requires HUD to administer programs and activities relating to housing and urban development in a manner that “affirmatively furthers fair housing” (“AFFH”).¹ This statutory language has been broadly interpreted as an outcome-based mandate to actively promote certain patterns of residential integration that HUD deems socially optimal. The duty to AFFH interpreted as an integration mandate is evident in several FHA regulations, including HUD’s “site and neighborhood standards,”²

1. See *infra* text accompanying notes 7–16.

2. See 24 C.F.R. §§ 93.150, 905.602(d)(3) (2020).

and it is supported by existing caselaw.³ This Article contends, however, that not all forms of residential segregation should be viewed alike. Certain patterns of residential segregation can be distinguished along two important dimensions: (1) voluntariness; and (2) net social impact. Notably, an outcome-based integration mandate is consistent with only one of the four categories of residential segregation implied by this typography: socially-negative involuntary segregation.

Part III examines patterns of residential segregation that have obtained because of involuntary government-sanctioned exclusionary policies and practices. Two forms of exclusion are considered: (1) policies and practices designed to keep people in; and (2) policies and practices designed to keep people out. This Part first examines government-sanctioned policies that compel minority groups to live in specific geographic areas by means of state-sponsored force, both directly and indirectly. This Part next considers government-sanctioned policies that prevent minority groups from living in specific geographic areas by means of state-sponsored force. Again, both direct and indirect forms of force are considered, including, as examples, sundown towns and exclusionary zoning policies, respectively.

Part IV examines patterns of residential segregation that have obtained not as the result of government-sanctioned exclusionary policies and practices but rather because of voluntary self-segregation. This Part considers two possible explanations for the preference to self-segregate in location-based communities: (1) the preference for residential segregation derives from a desire to escape hostility encountered living as a minority in relatively homogenous majority communities; and (2) the preference for residential segregation derives from certain social benefits that result from living together as a relatively homogenous minority community. The former is viewed as socially negative whereas the latter is viewed as socially positive. This Part first examines residential segregation as a voluntary response to a hostile environment and considers how the government should best approach this form of residential segregation. Often neglected as an explanation for residential segregation is the extent to which spatial clustering is created because of various forms of violence.

3. See, e.g., *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211-12 (1972) (emphasizing that one of the purposes of the FHA was to promote integrated living patterns).

This Part next explores residential segregation as originating from certain social benefits that result from living together in a location-based community. It argues that the existence of such spatial clustering implies that the government must adopt an *ex ante* choice-based approach to residential integration that seeks to protect and enable freedom of choice in housing rather than an *ex post* outcome-based approach that seeks to implement and maintain specific patterns of residential segregation deemed socially optimal by well-meaning policy elites. The central thesis of this Article is that the HUD mandate to AFFH must be interpreted as a responsibility to promote fair housing choice, to enlarge the set of affordable housing options to include as many desired alternatives as possible, and not as an outcome-based mandate to site affordable housing in a limited number of areas that best implements certain patterns of residential integration that are socially optimal under certain formal indices of segregation. The duty to AFFH must be a duty to understand in which local communities within a jurisdiction those who are in need of affordable housing truly want to live and to expand or modify the set of affordable housing alternatives to encompass as many of these desired locations as is fiscally feasible. The objective must be to provide people with the freedom to choose across a diverse set of affordable housing options that do not simply promote residential integration but, more importantly, truly represent places where people want, and would choose, to reside.

Finally, this Article contends that criticisms of gentrification are implicitly grounded in a choice-based view of residential integration. The best argument against gentrification is fundamentally an argument about restricting freedom of choice in housing and, more specifically, about infringing upon the right to choose to voluntarily self-segregate in relatively homogenous location-based communities.

Part V briefly concludes.

II. BACKGROUND

This Part considers the legal and statutory justification for HUD's mandate to promote residential integration. This Part also introduces a typography of residential segregation that is examined in greater depth throughout the remainder of this Article.

A. Integration Mandate

The FHA establishes two mandates for HUD. The first mandate requires HUD to eliminate discrimination in the sale, rental, or financing of dwellings based upon race, color, religion, sex, familial status, national origin, or disability.⁴ This first mandate has been interpreted to imply that the government must ensure freedom of choice in housing.⁵ Much energy and focus has been devoted to this first mandate, and the promotion of equal opportunity in housing has resulted in a sprawling ecosystem of public, nonprofit, and private institutions that conduct audits, litigate, and provide support to fight discriminatory activity of all kinds.⁶

The second mandate established by the FHA requires HUD to administer programs and activities relating to housing and urban development to AFFH.⁷ This responsibility to AFFH has been broadly interpreted as an outcome-based mandate to actively promote certain patterns of residential integration.⁸ Under this view, recipients of federal housing and urban development funds must do more than simply not discriminate; recipients must also address residential segregation and actively seek ways to dismantle such segregation.⁹ The courts have played a significant role in promoting this interpretation of the statute, elevating residential integration as a direct goal equal to the protection of equality of choice. For example, in *Trafficante v. Metropolitan Life Insurance*

4. 42 U.S.C. § 3604(a)–(b), (f)(1)–(2) (2018). Although the FHA was amended in 1988 to extend civil rights protections to persons with “handicaps,” the term “disability” is more commonly used and accepted today to refer to an individual’s physical or mental impairment that is protected under federal civil rights laws. See, e.g., *Disability*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/disability_main (last visited Apr. 2, 2021).

5. See Brian Patrick Larkin, *The Forty-year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1625–26 (2007) (describing Senator Brooke’s contention that fair housing legislation was essential to protecting individuals’ freedom to choose where they want to live).

6. Raphael Bostic & Arthur Acolin, *The Potential for HUD’s Affirmatively Furthering Fair Housing Rule to Meaningfully Increase Inclusion*, in A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 236, 236 (Christopher Herbert et al. eds., 2018).

7. 42 U.S.C. § 3608(d), (e)(5).

8. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 144 (2011).

9. *Id.* at 136–44.

Co.,¹⁰ the Supreme Court opined that, in addition to advancing individual freedom of choice in housing, Congress enacted the FHA to ensure the benefits of integration for “the whole community.”¹¹ Reinforcing this principle in *Gladstone, Realtors v. Village of Bellwood*, the Court granted white plaintiffs standing to sue on the basis that the “transformation of their neighborhood from an integrated to a predominantly Negro community [was] depriving them of ‘the social and professional benefits of living in an integrated society.’”¹² Likewise, in *Linmark Associates v. Township of Willingboro*,¹³ the Court stated that Congress, through enactment of the FHA, made a “strong national commitment to promote integrated housing.”¹⁴ In debates leading to the passing of the FHA, it was noted “an overwhelming proportion of public housing . . . in the United States—directly built, financed[,] and supervised by the [f]ederal government—[was] racially segregated.”¹⁵ Lower courts have also endorsed both equal opportunity and residential integration as dual goals of the FHA.¹⁶

The duty to AFFH as an outcome-based integration mandate is evident in several FHA regulations, including HUD’s site and neighborhood standards. This regulation prohibits the siting of new construction projects in:

10. 409 U.S. 205 (1972).

11. *Id.* at 210–12.

12. 441 U.S. 91, 111, 115 (1979); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376, 382 (1982) (acknowledging *Gladstone’s* precedent that standing could be granted on grounds of deprivation of the “benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices,” but remanding due to insufficiency of allegations on other grounds).

13. 431 U.S. 85 (1977).

14. *Id.* at 95 (citation omitted).

15. Scott A. Marks, *Fair Housing Desegregation Policy: Recent Developments and Proposed Site Selection Safe Harbors*, COATS ROSE (May 11, 2013), <https://www.coatsrose.com/2013/05/11/fair-housing-desegregation-policy-recent-developments-and-proposed-site-selection-safe-harbors/>.

16. *See, e.g., Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979) (endorsing Senator Mondale’s understanding of the FHA’s integrative purpose as “[t]he primary objective”); *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 164 (7th Cir. 1974) (“[T]he right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is [integration].”); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the [FHA] was designed to combat.”).

(3) [A]n area of minority concentration unless: (i) There are already sufficient, comparable opportunities outside areas of minority concentration for housing minority families in the income range that is to be served by the proposed project; or (ii) The project is necessary to meet overriding housing needs that cannot feasibly be met otherwise in that housing market area. “Overriding housing needs” shall not serve as the basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites outside areas of minority concentration are unavailable.

(4) The site for new construction shall not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.¹⁷

The rule further requires a site to provide access to services and amenities (including education) that are “at least equivalent” to communities without subsidized housing.¹⁸

In 2015, HUD issued the AFFH Rule, reinforcing the interpretation of its duty to AFFH as an outcome-based mandate to promote residential integration.¹⁹ The stated purpose of the Rule was to “provide program participants with an effective planning approach to aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.”²⁰ The Rule described HUD’s obligation to AFFH as follows:

[AFFH] means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing

17. 24 C.F.R. § 905.602(d)(3)–(4) (2020).

18. *Id.* § 905.602(d)(8). There are other provisions that govern the special case of public housing demolition and replacement and which permit building of at least 50% of public housing units back on site. *Id.* § 905.602(d)(5).

19. 42 U.S.C. § 3608(d), (e)(5) (2018).

20. 24 C.F.R. § 5.150 (2016).

segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.²¹

HUD operationalized this substantive definition through a mandatory planning procedure that requires HUD grantees to identify impediments to fair housing and commit to measurable steps to overcome such obstacles in the future.²² Specifically, HUD program participants, including public housing authorities (“PHAs”) and jurisdictions that are required to submit a Consolidated Plan in connection with the receipt of Community Development Block Grant, HOME Investment Partnerships, Housing Opportunities for Persons with AIDS, or Emergency Solutions Grants funding must conduct and submit to HUD an “Assessment of Fair Housing” (“AFH”),²³ replacing the previous Analysis of Impediments to Fair Housing process that was frequently ignored by HUD grant recipients.²⁴ The AFH relies on data provided by HUD as well as local knowledge to identify patterns of residential segregation, racially- or ethnically-concentrated areas of poverty, and disproportionate housing needs.²⁵ The Rule also provides that the AFH shall be “informed by meaningful community participation,” instructing program participants to “give the public reasonable opportunities for involvement in the development of the AFH.”²⁶ Based upon this data and community involvement, participants are then required to identify “contributing factors” that cause these fair housing issues.²⁷ Finally, participants must “[s]et goals for overcoming the effects of contributing factors.”²⁸ Although the AFFH Rule is primarily a planning rule—and not a rule designed to enforce the duty to AFFH—the Rule does permit HUD to use existing administrative

21. *Id.* § 5.152.

22. *Id.*

23. *Id.* § 5.154.

24. Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POL’Y DEBATE 85, 85 (2019).

25. 24 C.F.R. § 5.154(d)(2).

26. *Id.* § 5.158(a).

27. *Id.* § 5.154(d)(3).

28. *Id.* § 5.154(d)(4)(iii).

enforcement mechanisms if participants do not comply with the Rule's provisions, such as funding cutoffs.²⁹

This Rule, in certain parts, reflects an outcome-based view of the AFFH statutory language under which HUD has an affirmative responsibility to establish or enforce specific patterns of residential integration that HUD itself has deemed socially optimal. As discussed below, this emphasis upon housing outcomes rather than upon the underlying causal determinants of such outcomes raises several conceptual difficulties and, to the extent that residential segregation is the product of free choice, conflicts with the first FHA mandate of ensuring freedom of choice in housing.³⁰ In May 2018, HUD announced that it would indefinitely suspend implementation of the 2015 AFFH Rule and removed its AFH tool for local governments.³¹

B. Theoretical Framework

This Article contends that not all forms of residential segregation are alike. Certain patterns of residential segregation can be distinguished along, at least, two important dimensions: (1) voluntariness; and (2) net social impact. This typography of residential segregation is summarized in Table 1.

Table 1. Typography of Residential Segregation

	<i>Socially Positive</i>	<i>Socially Negative</i>
<i>Voluntary</i>	Gay Village (2020s)	Gay Village (1970s)
<i>Involuntary</i>	Army Barracks	Roman Ghetto

29. See *id.* §§ 5.162(d)(1), 5.166(a), 91.225(a)(1), 91.500(a)–(b).

30. See, e.g., W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA* 196–97 (1994) (noting the disagreement over the purpose of the FHA); Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1979 n.47 (2000) (describing the two competing views of the goals of the FHA); see also Alexander Polikoff, *Sustainable Integration or Inevitable Resegregation: The Troubling Questions*, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 43, 47–50 (John M. Goering ed., 1986) (examining whether the FHA's intent was to solely eliminate discrimination or actively promote integration).

31. *HUD Indefinitely Suspends AFFH Rule, Withdraws Assessment Tool*, NAT'L LOW INCOME HOUS. COAL. (May 21, 2018), <https://nlihc.org/resource/hud-indefinitely-suspends-affh-rule-withdraws-assessment-tool>.

Some patterns of residential segregation are involuntary. In this case, individuals have been confined to live in a specific geographic area by means of violence or some other direct type of force. Further, these location-based communities can be either socially positive or socially negative. For example, the sectioned-off neighborhood in which the Jewish people of Rome were forcibly confined to live was undeniably socially negative.³² The large number of people living together in a small geographic area combined with the widespread poverty resulted in poor living conditions and the spread of fatal disease.³³ By contrast, institutions, such as a private boarding school or an army barracks, that are established to better pursue some work-related task are presumed to have a positive social welfare impact.³⁴ These institutions are often residentially segregated according to age or gender on the justification that this form of segregation is necessary to promote certain organizational objectives.³⁵ Although the decision to enroll in such an institution is a product of free choice, the choice of where to live, upon enrolling, is not: The enrollee must live wherever and with whomever the institution decides.

Not all forms of residential segregation are involuntary. Some residential segregation is the product of free choice where people, often members of a distinct minority group, have voluntarily chosen to self-segregate into a location-based community for the benefits that this spatial clustering provides.³⁶ Again, such spatial clustering can also be either socially positive or socially negative. This Article uses the gay village as an illustrative example. Gay villages in existence during the latter part of the twentieth century were often formed as an intentional act of self-protection.³⁷ Socio-political ostracism, in combination with the very real threat of violence, motivated gay and lesbian people to live together in segregated

32. See *infra* Part III.A.1.

33. See *infra* Part III.A.1.

34. ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4-5 (1961). Other examples might include institutions organized to protect the community against people deemed an intentional threat to it, such as P.O.W. camps or a jail, or institutions designed as retreats from the world, such as a convent or a monastery. *Id.* at 4-5.

35. See, e.g., Theresa A. Hughes, *The Advantages of Single-sex Schooling*, 23 NAT'L F. EDUC. ADMIN. & SUPERVISION J. 5, 11-12 (2006) (arguing that one advantage of same-sex schooling is being able to accommodate boys' and girls' different learning styles).

36. See *infra* Part IV.B.

37. See *infra* Part IV.A.1.

urban neighborhoods for their mutual protection.³⁸ Voluntary self-segregation in response to broader widespread oppression is not socially positive and can be viewed as concrete evidence of systematic discrimination by a homophobic majority against a discrete and vulnerable minority.

Of course, this is not how gay villages are generally perceived today. To the contrary, these communities are publicly celebrated as a vibrant and essential component of the overall cultural fabric of most cities.³⁹ No longer regarded as primarily a defensive response to homophobic aggression, this form of residential segregation is viewed as socially positive, in large part, due to the independent benefits that derive from this specific form of spatial clustering.⁴⁰ For example, living in close geographic proximity to those of similar sexual orientation promotes social assortative matching and has allowed this sexual minority to more easily organize as a coherent voting bloc to successfully fight to ensure that their rights have been legally recognized and protected.⁴¹

The remainder of this Article explores the categories of residential segregation set forth in Table 1.⁴² Notably, an *ex post* outcome-based integration mandate is consistent with only one of the four identified categories of residential segregation: socially-negative involuntary residential segregation.

III. INVOLUNTARY RESIDENTIAL SEGREGATION

This Part examines patterns of residential segregation that have obtained not as the result of voluntary self-segregation but because of government-sanctioned exclusionary policies and practices. Two forms of exclusion are considered: (1) policies and practices designed to keep people *in*; and (2) policies and practices designed to keep people *out*.

A. Keeping People In

This Section examines government-sanctioned policies that compel minority groups to live in specific geographic areas by means

38. See *infra* Part IV.A.1.

39. See *infra* Part IV.B.1.

40. See *infra* Part IV.B.1.

41. See *infra* Part IV.B.1.

42. See *supra* Table 1.

of state-sponsored force. Both direct and indirect forms of force are considered.

1. Direct Force

The most obvious example of forcibly confining a specific minority group to a specific geographic area is the official creation of a ghetto. The Roman Ghetto, which was established in 1555, offers a stark example of the application of such direct force.⁴³ Promulgated by Pope Paul IV, the Papal bull *Cum nimis absurdum* required the Jews of Rome, who had lived within the city as a community since approximately 161 B.C. and numbered around 4,700, to reside within a single walled-off quarter of Rome.⁴⁴ The area chosen for the Roman Ghetto was a relatively undesirable part of the city subject to frequent flooding by the Tiber River.⁴⁵ Gates were added as the ghetto was successively enlarged.⁴⁶ These gates were opened at dawn and closed every night an hour or two after sundown depending upon the time of year.⁴⁷ As the Jewish community inside this walled-off ghetto expanded in size, overcrowding grew more severe. Because the community could not expand horizontally, residents of the ghetto built vertical additions to their homes, blocking the sun from reaching the already dark and narrow streets of the densely packed ghetto.⁴⁸ The large number of people living together in a small geographic area combined with the widespread poverty of the population due to strict occupational restrictions (i.e.,

43. MITCHELL DUNEIER, *GHETTO: THE INVENTION OF A PLACE, THE HISTORY OF AN IDEA* 8 (2016).

44. See KENNETH R. STOW, *CATHOLIC THOUGHT AND PAPAL JEWRY POLICY: 1555-1593*, at 3 (1977); *Virtual Jewish World: Rome, Italy*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/rome-jewish-history-tour#5> (last visited Feb. 12, 2021).

45. DUNEIER, *supra* note 43.

46. See *id.* Initially, there were two gates in the wall, increasing to three in the sixteenth century, then to five, and, finally, to eight during the nineteenth century. *Id.*; *Roman Ghetto*, WIKIVISUALLY, https://wikivisually.com/wiki/Roman_Ghetto (last visited Feb. 26, 2021).

47. See DUNEIER, *supra* note 43, at 11; L. Scott Lerner, *Narrating over the Ghetto of Rome*, 8 JEWISH SOC. STUD. 1, 1 (2002). When these Jewish people did venture outside the ghetto, the men had to wear a yellow cloth (the “sciamanno”) and the women a yellow veil. *Roman Ghetto*, *supra* note 46.

48. See Lerner, *supra* note 47; see also DANA KATZ, *THE JEWISH GHETTO AND THE VISUAL IMAGINATION OF EARLY MODERN VENICE* 28 (2017) (“Overcrowding was an endemic problem in the ghetto. Jews were forced to build vertically in Venice[] as ghetto tenements ascended up to nine stories.”).

Roman Jews were only allowed to work unskilled jobs such as rag-and-bone men, secondhand dealers, or fish mongers) resulted in poor living conditions and the spread of fatal disease.⁴⁹ It was not until 1870 that the official requirement that Jewish people live in the Roman Ghetto came to an end.⁵⁰

2. Indirect Force

Today, policies designed to keep people confined to a certain geographic area are less overt than the formal creation of a segregated ghetto like the Roman Ghetto. For example, some have argued that certain state and federal housing policies have indirectly helped create and maintain a similar form of involuntary residential segregation.⁵¹ The location of public housing in particular has been highlighted as contributing to the establishment and entrenchment of residential segregation and concentrated poverty throughout the United States.⁵² Most public housing built from the 1950s to the 1970s in the United States was comprised of large, densely populated “projects,” often consisting of drab, uninspiring high-rise buildings located in poor, racially-segregated communities.⁵³ More

49. See DUNEIER, *supra* note 43, at 10–11.

50. See Lerner, *supra* note 47. The Roman Ghetto was the last remaining ghetto in Western Europe until Jewish ghettos were reintroduced by Nazi Germany in the 1930s. During World War II, the Third Reich reestablished Jewish ghettos in Nazi-occupied Europe, mostly in Eastern Europe, for the express purpose of segregation, persecution, terror, and exploitation of the Jewish people. See Philip Friedman, *The Jewish Ghettos of the Nazi Era*, 16 JEWISH SOC. STUD. 61, 75–77 (1954).

51. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDER-CLASS 51 (1993). See generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (discussing how segregation in America is the byproduct of explicit government policies at the local, state, and federal levels).

52. See, e.g., Sandra J. Newman & Ann B. Schnare, “... *And a Suitable Living Environment*”: The Failure of Housing Programs to Deliver on Neighborhood Quality, 8 HOUS. POLY DEBATE 703, 703 (1997) (“[P]roject-based assistance programs do little to improve the quality of recipients’ neighborhoods relative to those of welfare households . . .”).

53. See ROD SOLOMON, BROOKINGS INST. METRO. POLY PROGRAM, PUBLIC HOUSING REFORM AND VOUCHER SUCCESS: PROGRESS AND CHALLENGES 2 (2005). See generally Robert Gray & Steven Tursky, *Location and Racial/Ethnic Occupancy Patterns for HUD-subsidized Family Housing in Ten Metropolitan Areas*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 30, at 235 (describing location patterns and racial and ethnic occupancy patterns for HUD-subsidized rental housing).

starkly, many cities in fact established separate public housing for black and white residents.⁵⁴ For example in Chicago, public housing officials have admitted to a policy of racial segregation and the imposition of racial quotas in housing projects.⁵⁵ HUD itself has also acknowledged constructing public housing in already segregated neighborhoods and to being “part of the problem” and “complicit in creating isolated, segregated, large-scale public housing.”⁵⁶ Some have argued that HUD long employed a deliberate policy of locating public housing residents in neighborhoods where their presence would not significantly disturb the prevailing patterns of residential segregation and urban development.⁵⁷

In fairness, HUD siting and neighborhood regulations do generally prohibit building new low-income housing in racially-concentrated neighborhoods.⁵⁸ As noted, these standards signify that the FHA has been interpreted not only as prohibiting discrimination, but, in conjunction with other statutes, as mandating HUD and its program participants to take proactive measures to overcome historic patterns of residential segregation and achieve more balanced and integrated living patterns.⁵⁹ There exist broad exceptions to these rules, however, that permit public housing to be developed if “sufficient, comparable opportunities” exist outside areas of the minority concentration or if a showing is made of “overriding need” for housing that cannot otherwise be met in the region.⁶⁰ Many have argued that ambiguity was intentionally built

54. See, e.g., *NAACP v. Sec’y of Hous. & Urb. Dev.*, 817 F.2d 149, 151 (1st Cir. 1987) (Boston); *Thompson v. U.S. Dep’t of Hous. & Urb. Dev.*, 348 F. Supp. 2d 398, 406 (D. Md. 2005) (Baltimore); *Walker v. U.S. Dep’t of Hous. & Urb. Dev.*, 734 F. Supp. 1289, 1294–96 (N.D. Tex. 1989) (Dallas); *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969) (Chicago).

55. *Gautreaux*, 296 F. Supp. at 909.

56. MICHAEL B. DE LEEUW ET AL., U.S. HOUS. SCHOLARS & RSCH. & ADVOC. ORGS., *RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES* 12 (2008) (quoting *Thompson*, 348 F. Supp. 2d at 467); see John M. Goering, *Introduction*, in *HOUSING DESEGREGATION AND FEDERAL POLICY*, *supra* note 30, at 197, 198.

57. DE LEEUW et al., *supra* note 56. See Off. of Pol’y Dev. & Rsch., *A Picture of Subsidized Households*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/assthsg/statedata98/descript.html> (last visited Feb. 22, 2021).

58. See 24 C.F.R. § 983.57(e)(2)–(3) (2020).

59. See Schwemm, *supra* note 8, at 127.

60. Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 199 (Xavier de Souza Briggs ed., 2005) (quoting 24 C.F.R. §§ 941.202(c)(i)(A)–(B), 983.6(b)(3)(ii)(A)–(B) (2005)).

into these siting and neighborhood standards from the outset both in the definition of “area of minority concentration” and with respect to the scope of the rules’ exceptions.⁶¹ This ambiguity has predictably resulted in substantial litigation and an overall weakening of regulatory standards over time such that the siting and neighborhood standards have been largely ineffective in controlling or reducing segregated public housing development.⁶²

B. Keeping People Out

This Section examines state-sponsored policies and practices that forcibly prevent minority groups from living in certain geographic areas. Again, both direct and indirect forms of force are considered.

1. Direct Force

The sundown town is a striking example of exclusion by means of direct force. Sundown towns, also known as sunset towns or gray towns, can be defined as all-white municipalities or neighborhoods in the United States that forcibly keep members of certain minority groups out after dark.⁶³ In a number of sundown towns, signs were posted that non-white people had to leave town by sundown.⁶⁴ For example, in Colorado, signs posted along the highway at the town or county line read: “No Mexicans After Night.”⁶⁵ Similarly, the town of Gardnerville, Nevada is alleged to have blown a whistle each day at 6:00 PM that alerted to Native Americans to leave town by sundown.⁶⁶ Most sundown towns, however, existed mainly by

61. See Michael J. Vernarelli, *Where Should HUD Locate Assisted Housing? The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY, *supra* note 30, at 214, 214.

62. See *id.* at 214–16.

63. See Kate Kelly, *The Green Book: The First Travel Guide for African-Americans Dates to the 1930s*, HUFFPOST, https://www.huffpost.com/entry/the-green-book-the-first_b_4549962 (last updated Mar. 8, 2014).

64. See JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 202 (2005).

65. See Peter Carlson, *When Signs Said ‘Get Out’ in ‘Sundown Towns,’ Racism in the Rearview Mirror*, WASHINGTON POST (Feb. 21, 2006), <https://www.washingtonpost.com/archive/lifestyle/2006/02/21/when-signs-said-get-out-span-classbankheadin-sundown-towns-racism-in-the-rearview-mirrorspan/0e80ab6c-51a7-4412-a320-168315ced22b/> (citing also to sundown signs in Connecticut that read: “Whites Only Within City Limits After Dark”).

66. See LOEWEN, *supra* note 64, at 23.

reputation—minorities just knew that there were certain places to avoid after dark.⁶⁷ Notably, “[t]hese towns were not limited to just the South—they ranged from Levittown, [New York], to Glendale, [California], and included the majority of municipalities in Illinois.”⁶⁸

In the case of sundown towns, racial segregation is created and enforced through an informal regime of harassment, intimidation, and physical violence perpetrated in some instances with the assistance of local law enforcement officials.⁶⁹ In most cases, however, the exclusion of minority groups from certain residential neighborhoods in the United States was achieved through non-violent means, primarily in the form of exclusionary zoning ordinances or restrictive covenants. In the early 1900s, many large and mid-size cities across the South and mid-South enacted racially-restrictive zoning ordinances that prohibited the sale of real property to blacks in white-majority neighborhoods.⁷⁰ Despite the prevalence of such restrictive zoning ordinances, the Supreme Court put an end to these explicitly exclusionary policies in 1917, holding in the landmark case of *Buchanan v. Warley*⁷¹ that race-based zoning violates the Due Process Clause of the Fourteenth Amendment.⁷² “The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property.”⁷³

This Supreme Court ruling of course did not put an end to race-based involuntary residential segregation. Partly in response to the constitutional prohibition against explicit government-instituted racial segregation, restrictive covenants increased in use throughout the 1920s as an alternative means of creating and maintaining

67. See Keith Oppenheim, *Texas City Haunted by 'No Blacks After Dark' Past*, CNN (Dec. 13, 2006, 9:44 PM), <http://www.cnn.com/2006/US/12/08/oppenheim.sundown.town/index.html>.

68. Kelly, *supra* note 63. In addition to non-whites, Jewish people were also excluded from living in certain sundown towns such as Lake Forest, Illinois. See STEPHEN R. HIGLEY, *PRIVILEGE, POWER, AND PLACE: THE GEOGRAPHY OF THE AMERICAN UPPER CLASS* 61 (1995) (noting that Lake Forest kept anti-Jewish and anti-black housing covenants until the 1960s).

69. See Oppenheim, *supra* note 67.

70. See MASSEY & DENTON, *supra* note 51, at 36.

71. 245 U.S. 60 (1917).

72. See *id.* at 20.

73. See *id.* (quoting *Carey v. City of Atlanta*, 84 S.E. 456, 460 (Ga. 1915)).

involuntary residential segregation.⁷⁴ Racially-restrictive covenants are private contractual documents, often drawn up by members of a neighborhood, that state that the signer promises not to sell the property in the future to any person who is non-white.⁷⁵ Because courts tended to view this activity as private individuals making decisions to personally benefit themselves, the profits of their companies, or the alleged safety of their cities, these exclusionary practices were largely ignored by the courts despite their obvious racially-segregative effect.⁷⁶ Indeed, in 1926, the Supreme Court affirmed the legality of racially-restrictive covenants in *Corrigan v. Buckley*,⁷⁷ holding that such contractual clauses constituted “private action” and as such, were not subject to the Due Process Clause of the Fourteenth Amendment.⁷⁸ As a consequence of this decision, the use of racially-restrictive covenants proliferated across the United States during the 1920s and 1930s.⁷⁹ It was not until 1948 that the Supreme Court finally overturned *Corrigan* in *Shelley v. Kraemer*,⁸⁰ expressly holding that racially-restrictive covenants were unconstitutional and, therefore, legally unenforceable.⁸¹ The Court concluded that private parties could abide by the terms of a racially-restrictive covenant but that judicial enforcement of this covenant qualified as state action and was, therefore, prohibited by the Equal Protection Clause of the Fourteenth Amendment.⁸²

2. Indirect Force

Today, policies and practices designed to keep people out of certain geographic areas are less overt than the racially-restrictive land use policies of the past. Instead, involuntary residential segregation is achieved through the relatively more indirect means

74. See Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 551 (2000).

75. See, e.g., William R. Ming, Jr., *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 203, 210 (1949).

76. See Kevin F. Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900-50*, 24 INT'L J. URB. & REG'L RSCH. 616, 623 (2000).

77. 271 U.S. 323 (1926).

78. See *id.* at 328-32.

79. See CHRIS M. ASCH & GEORGE D. MUSGROVE, *CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION'S CAPITAL* 244 (2017).

80. 334 U.S. 1 (1948).

81. See *id.* at 23.

82. See *id.* at 13-20.

of exclusionary zoning.⁸³ Stated simply, exclusionary zoning is the use of zoning rules and ordinances to exclude certain types of land uses from a community.⁸⁴ For example, localities use zoning to limit the supply of available housing units by prohibiting multifamily residential dwellings, limiting the number of people per unit of land, or mandating minimum lot size or minimum square footage requirements.⁸⁵ In theory, the intention of exclusionary zoning is to bolster property values and to safeguard the public finances of the local community.⁸⁶ Lower-income residents generally demand more public resources, and wealthier residents may be required to subsidize these residents, forcing more affluent inhabitants to pay more in local taxes without receiving any additional direct benefits in exchange.⁸⁷ Moreover, the entrance of lower-income residents is seen as threatening existing property values: As the neighborhood's median income level decreases, potential homebuyers may perceive the area as deteriorating or somehow less desirable.⁸⁸ To prevent this subsidization and to maintain the value of private real estate assets, localities enact exclusionary zoning ordinances designed to restrict the access of relatively lower-income groups to the community.⁸⁹

83. See, e.g., Maria Marulanda, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321, 342-43, 348 (2010).

84. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 39 (1990). See generally Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (discussing the lack of clear limits on the ability of communities and local governments to control land development).

85. See, e.g., Keith R. Ihlanfeldt, *Exclusionary Land-use Regulations with Suburban Communities: A Review of the Evidence and Policy Prescriptions*, 41 URB. STUD. 261, 263-64 (2004).

86. See, e.g., Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 31-33 (1996).

87. See *id.*; see also Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 18 (2001) (describing how exclusionary zoning aligns taxes and services with preferences of residents).

88. See Robert Cervero & Michael Duncan, *Neighbourhood Composition and Residential Land Prices: Does Exclusion Raise or Lower Values?*, 41 URB. STUD. 299, 312 (2004).

89. In addition, exclusionary zoning is also justified as a means by which to preclude the potential deleterious consequences of increased population density. See, e.g., William T. Bogart, *'What Big Teeth You Have!': Identifying the Motivations for Exclusionary Zoning*, 30 URB. STUD. 1669, 1670 (1993). The claim is that more people in a community results in more traffic congestion that is likely to negatively interfere with the existing residents' quality of life. See *id.* at 1671. For example, an

Although exclusionary zoning may provide local communities with certain economic benefits, many have argued that exclusionary zoning serves primarily to increase racial or ethnic residential segregation. For example, a recent study found that residential segregation is positively associated with land use restrictions, such as local project approvals and local zoning approvals.⁹⁰ Places that require multiple levels of approval for housing to be built are more segregated largely because such regulations hinder new housing development.⁹¹ Less benignly, some have argued that exclusionary zoning can be viewed as an indirect attempt to intentionally exclude certain minority groups independent of any negative social or economic effects that may result from the arrival of such groups.⁹² Under this view, exclusionary zoning is an indirect means by which homogeneous communities keep out or exclude members of certain minority groups and is a way for a biased majority to latently satisfy its underlying discriminatory preferences.⁹³

IV. VOLUNTARY RESIDENTIAL SEGREGATION

This Part examines patterns of residential segregation that have obtained not as the result of government-sanctioned exclusionary policies and practices but instead because of *voluntary* residential segregation. This Part considers two possible explanations for the preference to self-segregate: (1) hostility encountered living as a minority in a relatively homogenous majority community; and (2) social benefits that result from living together as a relatively

increase in population density might strain limited or vulnerable environmental resources, such as water or air, especially if the community has been designed in a relatively automobile-dependent fashion. *See id.*

90. *See* Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 12 (2016).

91. *See id.* at 11–12 (finding that segregation is not associated with open space requirements, supply restrictions, or delayed approvals).

92. *See, e.g.,* WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 328–29 (1985); *see also* Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 695, 710 (2008) (stating that given the extent to which community wealth is strongly positively correlated with the degree of local land use regulation, “researchers and policy-makers should seriously consider exclusionary desires as a motivation in many instances”).

93. *See, e.g.,* Ihlanfeldt, *supra* note 85, at 273. *See generally* INGRID G. ELLEN, *SHARING AMERICA'S NEIGHBORHOODS* (2000) (discussing racial integration and segregation in American neighborhoods and their causes).

homogenous minority community. The former is presumed to be socially negative, while the latter is presumed to be socially positive.

A. *Socially-negative Voluntary Residential Segregation*

This Section examines residential segregation as a voluntary response to a hostile environment and considers how the government should best approach this form of residential segregation.

1. Segregation as a Response to a Hostile Environment

Often neglected as an explanation for residential segregation is the extent to which spatial clustering is a response to various forms of violence, ranging from physical assault to harassment and verbal abuse. As a reaction to threats against their lives and property, many people of color left mixed-race neighborhoods and clustered as a defensive strategy in large, overcrowded primarily urban neighborhoods that provided some measure of protection and safety from white violence or aggression.⁹⁴ This demand for some type of sanctuary from a hostile majority population continues to the present, as certain white neighborhoods maintain a reputation among minority groups for intolerance and prejudice.⁹⁵ Margaret Johnson, one of the first black residents to move to a predominantly-white neighborhood in West Baltimore around the 1960s explained: "They were friendly, but they were prejudiced. They didn't want to live where colored people did"⁹⁶ Similarly, an influential study found that "African Americans overwhelmingly prefer 50-50 areas, a density far too high for most whites—but their preferences are driven not by [racial] solidarity or neutral ethnocentrism but by fears of white hostility."⁹⁷ Less starkly, some minorities choose not to live in predominantly-white neighborhoods simply to avoid the

94. See GREGORY SMITHSIMON, CAUSE: . . . AND HOW IT DOESN'T ALWAYS EQUAL EFFECT 187 (2018). See generally STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS (2000) (analyzing the ways minority groups are geographically segregated by whites through intimidation and threats of violence).

95. See generally MEYER, *supra* note 94 (discussing modern racial segregation through a variety of methods, including intimidation, violence, and unjust laws).

96. W. EDWARD ORSER, BLOCKBUSTING IN BALTIMORE: THE EDMONSON VILLAGE STORY 1 (1994).

97. See Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937, 937 (2002).

constant burden of having to disprove the discriminatory stereotypes of overtly judgmental white neighbors.⁹⁸ As one Washington-area resident stated: “I really wasn’t interested in moving into an all-white neighborhood and being the only black pioneer down there. I don’t want to come home and always have my guard up. After I work eight hours or more a day, I don’t want to come home and work another eight.”⁹⁹

Residential segregation as a product of fear of ostracism or potential violence by a hostile majority population is not limited to race or ethnicity. For example, gay villages in existence during the latter part of the twentieth century were often formed as an intentional act of self-protection.¹⁰⁰ A “gay village” can be defined as a geographical area with generally recognized spatial boundaries inhabited by a large number of gay and lesbian people that often contain a large number of gay and lesbian-friendly establishments such as gay bars and pubs, nightclubs, restaurants, boutiques, and bookstores,¹⁰¹ and they are often the location of annual events that celebrate LGBTQ culture such as OutFest or the LGBTQ Pride Parade.¹⁰² Sociologists have described such visibly gay neighborhoods as “not only a residential space [but] . . . also the space for social interaction, for business activities of all kinds, for leisure and pleasure, for feasts and politics.”¹⁰³ In constructing their

98. See *id.* at 953.

99. Gregory Smithsimon, *Are African American Families More Vulnerable in a Largely White Neighborhood?*, GUARDIAN (Feb. 21, 2018, 6:00 PM), <https://www.theguardian.com/books/2018/feb/21/racial-segregation-in-america-causes>; see also TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 59 (2016) (“[S]ome blacks avoid residing in white neighborhoods to limit unpleasant experiences with whites. . . . [or] to avoid interracial conflict . . .”).

100. See AMIN GHAZIANI, *THERE GOES THE GAYBORHOOD?* 38 (2014).

101. Martin P. Levine, *Gay Ghetto*, 4 J. HOMOSEXUALITY 363, 364 (1979).

102. See, e.g., Tim Davis, *The Diversity of Queer Politics and the Redefinition of Sexual Identity and Community in Urban Spaces*, in *MAPPING DESIRE: GEOGRAPHIES OF SEXUALITIES* 284, 284–85 (David Bell & Gill Valentine eds., 1995); see also Mattias Duyves, *Framing Preferences, Framing Differences: Inventing Amsterdam as a Gay Capital*, in *CONCEIVING SEXUALITY: APPROACHES TO SEX RESEARCH IN A POSTMODERN WORLD* 51, 60 (Richard G. Parker & John H. Gagnon eds., 1995) (contending that one of the key components of the construction of a “gay place” is a calendar of gay events along with visible gay life).

103. Manuel Castells & Karen Murphy, *Cultural Identity and Urban Structure: The Spatial Organization of San Francisco’s Gay Community*, in *URBAN POLICY UNDER CAPITALISM* 237, 246 (Norman I. Fainstein & Susan S. Fainstein eds., 1982); see also MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS* 150–51 (1983) (describing the location, boundaries, and characteristics of the gay community in San Francisco).

own urban enclaves in this way, the LGBTQ community has come to “figure prominently” in the redevelopment and gentrification of the inner city.¹⁰⁴ For example, in San Francisco, gay men renovated dilapidated (and affordable) Victorian homes, opened new businesses, including gay bars, and created one of the earliest and most well-known gay villages dubbed the “Castro” (after Castro Street).¹⁰⁵ Other famous gay villages include New York City’s Greenwich Village, Chelsea, and Hell’s Kitchen neighborhoods, Boston’s South End and Jamaica Plain, Chicago’s Boystown, and Washington D.C.’s Dupont Circle.¹⁰⁶

Historically, socio-political ostracism in combination with the very real threat of physical violence motivated homosexual men and women to voluntarily choose to live together in segregated urban neighborhoods for their mutual protection: This persecuted minority established separate distinct communities in response to the widespread oppression encountered in areas dominated by a heterosexual majority.¹⁰⁷ Outside gay villages, gay men and women could not (and often still cannot in certain parts of the United States) express sexual identity differently for fear of homophobic violence that ranged from serious physical assault to harassment and verbal abuse.¹⁰⁸ These victims of homophobic violence rarely complained or took retaliatory steps for fear of the negative consequences of public exposure on their jobs, families, or social lives.¹⁰⁹ Gay and lesbian “moral refugees”¹¹⁰ perceived their emerging spatial concentrations as a “beacon of tolerance”¹¹¹ and as a “liberated zone” that promised much-needed reprieve from various

104. Mickey Lauria & Lawrence Knopp, *Toward an Analysis of the Role of Gay Communities in the Urban Renaissance*, 6 URB. GEOGRAPHY 152, 152–53 (1985).

105. Michael Sibalis, *Urban Space and Homosexuality: The Example of the Marais, Paris’ ‘Gay Ghetto’*, 41 URB. STUD. 1739, 1739–40 (2004).

106. See, e.g., GHAZIANI, *supra* note 100, at 38–39, 44, 47, 60.

107. See, e.g., Deana F. Morrow, *Older Gays and Lesbian: Surviving a Generation of Hate and Violence*, 13 J. GAY & LESBIAN SOC. SERVS. 151, 156–57 (2001).

108. See ANGELA MASON & ANYA PALMER, *QUEER BASHING: A NATIONAL SURVEY OF HATE CRIMES AGAINST LESBIANS AND GAY MEN* 68 (1996).

109. See, e.g., PAUL G. CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 122 (1969).

110. See CASTELLS, *supra* note 103, at 161.

111. Kath Weston, *Get Thee to a Big City: Sexual Imaginary and the Great Gay Migration*, 2 GLQ: J. LESBIAN & GAY STUD. 253, 262 (1995). See generally Jon Binnie & Gill Valentine, *Geographies of Sexuality – A Review of Progress*, 23 PROGRESS HUM. GEOGRAPHY 175 (1999) (conducting a literature review on the development of work on geographies of sexuality).

forms of heterosexual hostilities.¹¹² These gay enclaves first formed as “a spatial response” to certain forms of oppression by the dominant sexual majority.¹¹³ These geographic areas attracted gay and lesbian people who were seeking to create a defined territory that they could safely inhabit and control and in which they could feel at home as members of a community intentionally set apart from a world rightly perceived as hostile (or, at the very least, unrelentingly indifferent to their rights, interests, or aspirations).¹¹⁴ This self-segregated geographic space constituted a friendly oasis, a place of safety and refuge, in an otherwise hostile society in which members of this oppressed sexual minority could benefit from the concentration of secure, nondiscriminatory resources and services.¹¹⁵

2. Policy Responses

From this perspective, a gay village largely represents a place of marginality created by or established in response to a hostile heterosexual community.¹¹⁶ This view of the gay village as a community separate and apart from the mainstream formed as a voluntary act of self-protection raises the following question with respect to residential segregation: When a minority population voluntarily creates a self-selected segregated residential community in response to varying forms of violence perpetuated against this group by a hostile dominant majority, should the government actively take steps to integrate this segregated minority population back into “mainstream” society? If the existence of a gay village is rightly interpreted as concrete evidence of systematic discrimination by a homophobic majority against a discrete and vulnerable sexual minority, then presumably concerted efforts should be undertaken to prevent or reduce such voluntary spatial clustering. If a gay village is a physical testament to intolerance and homophobic small-mindedness, then this form of residential segregation must not be viewed as a social positive. Instead, like the crowded, poorly maintained urban ghettos of many cities in the United States, this

112. Amin Ghaziani, ‘Gay Enclaves Face Prospect of Being Passé’: *How Assimilation Affects the Spatial Expressions of Sexuality in the United States*, 39 INT’L J. URB. & REG’L RSCH. 756, 759 (2015); see CASTELLS, *supra* note 103, at 139.

113. See Lauria & Knopp, *supra* note 104, at 152.

114. See CHRISTINA B. HANHARDT, SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE 221–26 (2013).

115. See *id.*

116. See Ghaziani, *supra* note 112.

form of residential segregation is an unmistakable, concrete sign of societal failure, sociopolitical repression, and the very real threat of physical violence from majority aggressors faced by a vulnerable minority group. Under this view, an argument can be made that the government should take affirmative steps to dismantle this residential byproduct of bigotry and discriminatory prejudice.

Such an argument would be mistaken, however. Even if this type of spatial clustering is socially negative (which may not be the case as discussed below), forcible integration of this minority group into a relatively more integrated residential population is in all likelihood not the optimal manner by which to eliminate or reduce this form of residential segregation. In fact, a colorable argument could be made that such forcible integration is likely to harm this minority population more than help.¹¹⁷ Not only does forcible integration of this community deprive the minority group of the social benefits of local community (examined in greater detail below), but implementation of policies and practices designed to prevent the congregation of a specific minority group impermissibly infringes upon this minority group's freedom of choice in housing. This minority group has intentionally chosen to cluster in a specific geographic area, albeit in response to the threat of physical violence and abuse. Any effort to integrate, and in the process, to dismantle this location-based community runs contrary to the express preferences of those who have sought sanctuary in the creation of their own urban enclaves and improperly substitutes government preferences as to optimal residential location for the individual preferences of those who have in fact been harmed by discrimination and prejudice.

Indeed, forcible residential integration may be indistinguishable from a policy response motivated by actual bigotry and homophobic prejudice. For example, in New York City, Mayor Robert Wagner ordered nearly all the gay bars in the city to close in a grossly ill-conceived effort to make the city "respectable" for the World's Fair in 1964 and 1965.¹¹⁸ During this time period, gay bars represented one of the few public places where gay and lesbian people could meet with relative safety.¹¹⁹ In shutting them down, the mayor deprived

117. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471-72, 511, 515-16 (1976).

118. See Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City: 1960-1980*, 12 COLUM. HUM. RTS. L. REV. 159, 167 (1980).

119. See *id.* at 166.

this community of an important public space in which sexual identity could be freely expressed without fear of reprisal.¹²⁰ Even in non-expressly gay bars, New York bartenders prohibited men from dancing together or touching each other, and some did not even allow men to enter unless accompanied by a woman on account of the incorrect belief that liquor licensing laws subjected bar owners and staff to legal liability for serving persons known to be homosexual.¹²¹ The specific intention of these municipal policies and practices was to impede the congregation of gay men and women and to dispossess this minority group of a place in the city where its members might feel safe and secure and able to enjoy some measure of distance or relief from an overpoweringly hostile homophobic majority population.¹²²

In the case of self-segregation in response to violence perpetuated by a hostile minority population, this Article suggests that, on balance, forcible integration is not an optimal policy response. Rather, the optimal policy response is extrinsic to housing policy and that is to take steps to directly eliminate the violence perpetrated against minority groups that creates the need in the first place to seek safety in a community separate and apart from others.¹²³ Alternatively, and more related to housing, the optimal policy response is to take steps to assure that all communities are as open and accessible as possible to minority groups and that members of protected minority groups can choose to live in any community they so choose free from harassment or other forms of discriminatory abuse. But it must always remain the choice of the individual to live in a specific neighborhood. It is patently unacceptable to force minority groups to live in sectioned-off, segregated urban ghettos. In essence, an individual should not be forced to live alone in a predominantly-white community as part of a grand social project to reduce the overall level of residential integration in society. Forcible integration is not the answer. Indeed, as the history of gay villages in New York City suggests, forcible integration on its face may be indistinguishable from the policy response of a majority population truly motivated by prejudicial animus or hatred.

In truth, the more difficult question presented here with respect to voluntary residential segregation is whether a minority group

120. *See id.*

121. *Id.* at 167.

122. *See id.*

123. *See, e.g.,* SHELBY, *supra* note 99.

should be allowed to forcibly keep out members of a majority group to preserve the homogeneity of a location-based community formed primarily as an act of protection against a hostile and discriminatory majority population.¹²⁴ In this case, exclusionary policies and practices by the minority group appears acceptable even though such policies and practices abridge the freedom of the majority group to choose to live wherever they so desire. Arguably, the cost of exclusion borne by the majority population is offset by the benefits of exclusion enjoyed by the minority population. That is, in an effort to escape and seek refuge from the hostilities of the majority group, it may be acceptable for a minority group to engage in a type of discrimination or self-segregation that would be entirely unacceptable if undertaken by a majority group that by definition does not suffer from such hostility.

B. Socially-positive Voluntary Residential Segregation

This Section examines residential segregation as a product of social benefits that result from living together in a location-based community and argues that the existence of such spatial clustering implies that the government must adopt an *ex ante* choice-based approach to residential integration that seeks to protect and enable freedom of choice in housing rather than an *ex post* outcome-based approach that seeks to implement and maintain specific patterns of residential segregation.

1. Social Benefits of Location-based Communities

Part IV.A described the formation of gay villages as concrete evidence of homophobic prejudice and bigotry. This is not how gay villages are commonly perceived today. To the contrary, these self-segregated communities are often found in upscale or trendy parts of town and tend to be publicly celebrated as a vibrant and essential component of the overall cultural fabric of a city.¹²⁵ For example, in Philadelphia, the gay village, which is located in the central business district, is proudly described on official city maps as the

124. For example, consider the use of anti-gentrification measures.

125. See, e.g., RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS 113, 133-34 (2002); Kenneth Kirkey & Ann Forsyth, *Men in the Valley: Gay Male Life on the Suburban-rural Fringe*, 17 J. RURAL STUD. 421, 428-29 (2001).

“Gayborhood.”¹²⁶ In adding gay pride rainbow flag symbols to street signs and crosswalks in this neighborhood, the city of Philadelphia has formally recognized and expressed its approval of this spatial clustering of gay men and women.¹²⁷ Thus the city now celebrates this “segregated” community as a valuable part of the city’s history and culture.¹²⁸ Likewise, in Chicago’s Boystown, the city has painted rainbow stripes on crosswalks throughout the neighborhood for the annual pride parade and has officially designated both the iconic rainbow pylons and the Legacy Walk as city landmarks.¹²⁹ Like most contemporary gay villages, there is no demand or public desire to break up this segregated community and reintegrate this voluntarily segregated minority back into a larger urban population.¹³⁰ In fact, many municipalities have encouraged the growth of such communities to attempt to put into practice the prescriptions of influential academic research that suggests that the presence of such gay enclaves or districts helps to display inclusiveness that in turn attracts employment opportunities to a municipality, particularly in the important innovation sector.¹³¹

The absence of any political will or social movement to reintegrate those living in gay villages back into the “mainstream” likely indicates not only that this residential segregation is the product of voluntary choice (albeit one motivated in some cases by self-protection) but also that there exist independent benefits that derive from this particular form of spatial clustering. Gay men and woman benefit from living in close geographic proximity to those of similar sexual orientation for several reasons, including social assortative mating, which is the tendency of humans to mate with their socioeconomic peers (i.e., those with similar social standing, job

126. See *The Gayborhood*, PHILLY PRIDE, <http://www.phillygaypride.org/the-gayborhood/> (last visited Feb. 14, 2021).

127. See Bob Skiba, *The Roots of the Gayborhood, The Eve of a Milestone*, HIDDEN CITY (Feb. 14, 2014), <https://hiddencityphila.org/2014/02/the-roots-of-the-gayborhood-the-eve-of-a-milestone/>.

128. See *id.*

129. See Amin Ghaziani, *Measuring Urban Sexual Cultures*, 43 *THEORY & SOC’Y* 371, 377 (2014) (“In 1997, Chicago became the first city in the United States to municipally mark its gayborhood.”).

130. Cf. Sibalis, *supra* note 105, at 1740 (“[O]nly in France, where the dominant political discourse rejects multiculturalism and minority rights in favour [sic] of ‘universal’ values presumably shared by all citizens, has the existence of the gay ghetto been perceived as a threat to the very foundations of national solidarity and become an issue of broad ideological significance.”).

131. See, e.g., RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* 238 (2002).

prestige, educational attainment, or economic background).¹³² Research shows that there is an increasing propensity for people to marry those more like themselves in terms of educational attainment or earned income and that this propensity applies across all socioeconomic statuses.¹³³ Accordingly, if a person is seeking a partner with very specific characteristics, then a “thick” market with respect to potential partners (i.e., one that is relatively large in size) is a substantial benefit, significantly increasing the probability of finding the “right” match.¹³⁴ For example, the likelihood that a gay man will find a suitable match is higher the larger the set of potential partners from which to choose: Gay villages provide increased opportunity for sexual minorities to find each other for friendship, sex, dating, and love.¹³⁵

In terms of social benefits more broadly, gay villages offer “havens” for self-expression and concretely symbolize the capacity to effect social change.¹³⁶ Control of space is an important element of identity given that most public space is “heterosexualized.”¹³⁷ The gay village helps support social networks and serves as an important expression of sexual and cultural identity.¹³⁸ This spatial concentration can be seen as a physical representation of solidarity and the empowerment of an otherwise oppressed minority group and has helped encourage the development of a political movement that has become an enormously powerful force in both local and national politics.¹³⁹ Living together as a discrete, unified community in gay

132. See, e.g., Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 832 (1973).

133. See, e.g., Raquel Fernández et al., *Love and Money: A Theoretical and Empirical Analysis of Household Sorting and Inequality*, 120 Q. J. ECON. 273, 304, 306 (2005); Raquel Fernández & Richard Rogerson, *Sorting and Long-run Inequality*, 116 Q. J. ECON. 1305, 1338 (2001).

134. See Fernández et al., *supra* note 133, at 329; Fernández & Rogerson, *supra* note 133.

135. See Ghaziani, *supra* note 112, at 757.

136. Wayne D. Myslik, *Renegotiating the Social/Sexual Identities of Places: Gay Communities as Safe Havens or Sites of Resistance?*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY* 156, 167 (Nancy Duncan ed., 1996).

137. See Gill Valentine, *(Re)Negotiating the Heterosexual Street: Lesbian Productions of Space*, in *BODYSPACE: DESTABILIZING GEOGRAPHIES OF GENDER AND SEXUALITY*, *supra* note 136, at 146, 146.

138. See Castells & Murphy, *supra* note 103.

139. See, e.g., David Bell & Gill Valentine, *Introduction: Orientations*, in *MAPPING DESIRE: GEOGRAPHIES OF SEXUALITIES*, *supra* note 102, at 1, 5; Jeffrey Weeks, *The Idea of a Sexual Community*, *SOUNDINGS*, Spring 1996, at 7, 76; cf. Verta Taylor et al., *From the Bowery to the Castro: Communities, Identities and*

villages has allowed this sexual minority to more easily organize as a coherent voting bloc to successfully fight to ensure that the rights of this minority are legally recognized and protected.¹⁴⁰ Gay villages have led to increased property ownership, expanding merchant associations, growing population density, and in turn, greater economic and political influence that has been wielded to successfully lobby government or to promote social movement in opposition to otherwise unfriendly governments.¹⁴¹

Of course, the social benefits of voluntary spatial clustering are not limited to clustering by sexual orientation but also include spatial clustering along other dimensions, such as religious affiliation or national origin. Immigrants coming to a foreign country often cluster in ethnic enclaves for mutual benefit and to create and maintain a sense of community in the new country. For example, most Chinatowns, which are ethnic enclaves of Chinese people outside of mainland China, are the product of mass migration and serve a socially-positive role as a transitional place into a new and unknown culture.¹⁴² These voluntarily segregated, location-based communities provide aid to recent immigrants in the form of social support, religious services, death benefits, meals, recreational activities, and so forth, and they allow valuable migrant social networks to develop and grow complex systems of interpersonal relations through which participants can exchange resources or knowledge.¹⁴³ By providing an urban space for those of the same national origin to interact and create potentially beneficial social relationships, ethnic enclaves assist members of minority groups in achieving meaningful economic mobility.¹⁴⁴ Moreover, such enclaves

Movements, in HANDBOOK OF LESBIAN AND GAY STUDIES 99, 100, 111 (Diane Richardson & Steven Seidman eds., 2002) (stating that the relationship between communities and activism is complex: “[G]ay and lesbian political activism both sustains and fragments gay community,” and it is “more accurate to think in terms of multiple communities rather than a unified lesbian and gay community.”).

140. See Bell & Valentine, *supra* note 139; Weeks, *supra* note 139.

141. See Myslik, *supra* note 136.

142. See Kartik Naram, *No Place Like Home: Racial Capitalism, Gentrification, and the Identity of Chinatown*, ASIAN AM. POL’Y REV., Spring 2017, at 31, 34.

143. See, e.g., Tarry Hum & Michela Zonta, *Residential Patterns of Asian Pacific Americans*, in 4 TRANSFORMING RACE RELATIONS 191, 209 (Paul M. Ong ed., 2000).

144. See, e.g., Min Zhou, *The Role of the Enclave Economy in Immigrant Adaption and Community Building: The Case of New York’s Chinatown*, in IMMIGRANT AND MINORITY ENTREPRENEURSHIP: THE CONTINUOUS REBIRTH OF AMERICAN COMMUNITIES 37, 57–58 (John S. Butler & George Kozmetsky eds., 2004); see also John R. Logan et al., *Immigrant Enclaves and Ethnic Communities in New York and Los Angeles*, 67 AM. SOCIO. REV. 299, 299 (2002) (defining an “immigrant

often include an alternative labor market that is ethnic-specific and does not demand the social or cultural skills of the host country.¹⁴⁵ By eliminating language or cultural barriers, enclave economies employ a greater proportion of members of this ethnic minority and hasten the incorporation of new immigrants into the foreign economy.¹⁴⁶

Like national origin, members of certain minority religious groups also often spatially cluster in segregated residential communities. For instance, many ultra-Orthodox Jewish people tend to live in specific, well-defined geographic areas.¹⁴⁷ Again, there are compelling reasons for this voluntary self-selection into relatively homogeneous residential neighborhoods. A local community provides important resources and services for observant Jews including yeshivas, Hebrew schools, Jewish day schools, and, most importantly perhaps, synagogues.¹⁴⁸ For Orthodox Jews, the law of the Sabbath (or Shabbat) strictly prohibits driving or riding in an automobile (or any other vehicle) from sundown on Friday until sundown on Saturday.¹⁴⁹ As a result, many Orthodox Jews prefer to reside within reasonable walking distance of a synagogue, especially older individuals who may suffer from medical conditions that make walking even short distances painful.¹⁵⁰ Living among other Orthodox Jews also ensures the availability of kosher grocery stores as well as an ample selection of kosher restaurants and other dining

enclave” as a segregated settlement in which spatial assimilation with the majority population is feasible and distinguishing such spatial clustering from an “ethnic community” where such assimilation is in fact feasible).

145. See, e.g., Alejandro Portes & Leif Jensen, *Disproving the Enclave Hypothesis*, 57 AM. SOCIO. REV. 418, 419 (1992).

146. See *id.* at 419–20.

147. See, e.g., Etan Diamond, *The Kosher Lifestyle: Religious Consumerism and the Suburban Orthodox Jews*, 28 J. URB. HIST. 488, 489 (2002) (describing the geographical areas in which Jewish neighborhoods developed in Toronto after World War II).

148. See IDDO TAVORY, *SUMMONED: IDENTIFICATION AND RELIGIOUS LIFE IN A JEWISH NEIGHBORHOOD* 20–23 (2016).

149. See, e.g., Arthur H. Neulander, *The Use of Electricity on the Sabbath*, in *TRADITION AND CHANGE: THE DEVELOPMENT OF CONSERVATIVE JUDAISM* 401, 401 (Mordecai Waxman ed., 6th ed. 1958) (calling for “Jews to re-examine” and “reinterpret” the scope of this prohibition).

150. Stav Ziv, *Walk to Worship: For Many Jewish HomeBuyers, a Nearby Synagogue is a Must*, NEWSDAY, <https://www.newsday.com/classifieds/real-estate/walk-to-worship-orthodox-jews-must-live-near-synagogues-1.9339095> (last updated Sept. 18, 2014, 10:39 AM).

establishments.¹⁵¹ Moreover, because those who greatly value strict adherence to religious tradition are more likely to be averse to marriage across religious lines, members of this religious community are relatively more likely to intramarry: In the same manner as a gay village, spatial clustering with respect to religious belief creates a “thick” market that increases the probability of finding a suitable match.¹⁵² Finally, a relatively homogenous local community facilitates observance of certain traditional rules, such as the Jewish law of *negiah* that forbids or restricts physical contact with members of the opposite sex outside of one’s spouse or certain immediate family members.¹⁵³ Voluntary residential segregation permits this religious minority to keep alive a traditionally observant way of life that may not be possible were this religious minority less segregated with individual households more widely dispersed throughout a more secular general population.¹⁵⁴

Voluntary self-selection into segregated residential areas along demographic characteristics helps maintain and promote a sense of community that increases social capital, helps strengthen social identity, and produces important knowledge spillover effects.¹⁵⁵ If social benefits are generated through spatial clustering, then the level of residential integration depicted in Figure 1 is *not* socially optimal (where the solid white cells represent residences occupied by the majority group and the solid black cells represent residences occupied by the minority group).

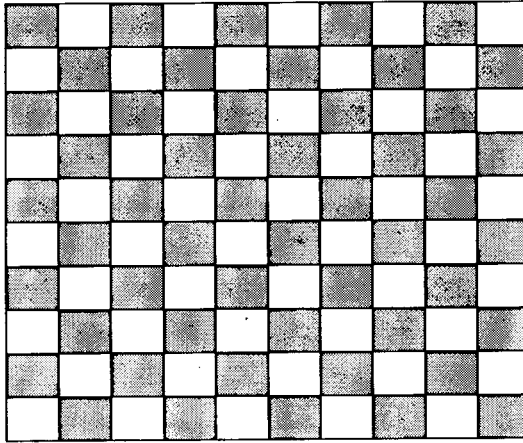
151. See, e.g., Diamond, *supra* note 147, at 497.

152. See, e.g., David McClendon, *Religion, Marriage Markets, and Assortative Mating in the United States*, 78 J. MARRIAGE & FAM. 1399, 1399 (2016) (finding that religion remains relevant in sorting partners for many young adults in today’s marriage market); see also David Lehmann & Batia Siebzehner, *Power, Boundaries and Institutions: Marriage in Ultra-Orthodox Judaism*, 50 EUR. J. SOCIO. 273, 283–84 (2009) (discussing geographic concentration and intramarriage as interlinked “boundaries” that protect ultra-Orthodox Jewish institutions).

153. See FAYDRA SHAPIRO, *BUILDING JEWISH ROOTS: THE ISRAEL EXPERIENCE* 120–21 (2005).

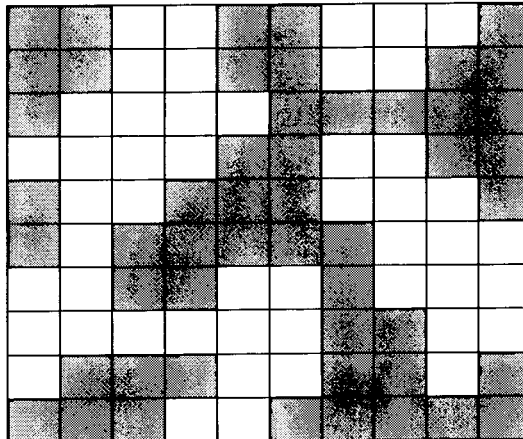
154. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (holding that Amish families could ignore a state’s compulsory schooling law after the eighth grade precisely because the Amish families lived in isolated, self-segregated communities). “This concept of life aloof from the world and its values is central to their faith.” *Id.* at 210. “[T]he Amish . . . have convincingly demonstrated the . . . interrelationship of belief with their mode of life . . . and the hazards presented by the State’s enforcement of a statute generally valid as to others.” *Id.* at 235.

155. See Hum & Zonta, *supra* note 143.

Figure 1. Perfect Residential Integration

If location-based communities have significant social value, then the socially-optimal level of residential integration must tradeoff this social benefit against the social costs of residential segregation. This balancing of social costs and social benefits implies that the socially-optimal level of residential segregation is not necessarily easily defined and can be expected to vary across space and time.

Figure 2 suggests one potential graphical representation of the socially-optimal level of residential segregation.

Figure 2. Socially-optimal Level of Residential Segregation

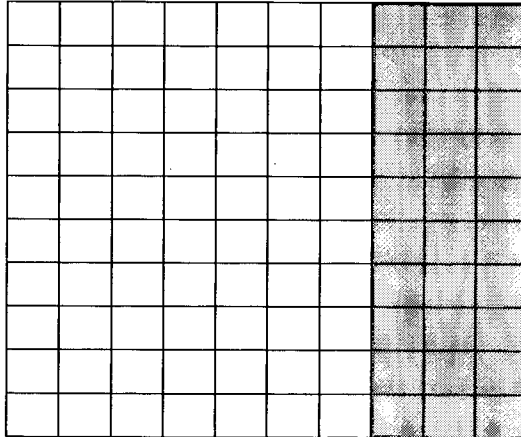
Observe that the socially-optimal level of residential segregation depicted in Figure 2 is not perfect residential integration (as depicted in Figure 1): There are still distinct location-based

communities, spatial clusters of certain demographic or socioeconomic minority groups who have freely and voluntarily chosen to live together in a location-based community for the social benefits that this spatial clustering directly provides. These local neighborhood communities, however, are not unduly large and are several in number. Likewise, the optimal level of residential segregation depicted in Figure 2 is not perfect residential segregation either (in which, as depicted in Figure 3 below, the proportion of population rates of the two populations is homogenous along only a single border that divides the jurisdiction into two distinct segregated communities). Rather, the socially-optimal level of segregation lies in between these two extremes of perfect residential integration and perfect residential segregation.

2. The Problem of Voluntary Residential Segregation

Voluntary residential segregation is the intentional separation of a minority group from the rest of the majority population undertaken by the minority group itself.¹⁵⁶ The spatial distribution depicted in Figure 3 represents an extreme form of this type of residential segregation.

Figure 3. Perfect Voluntary Residential Segregation



156. See, e.g., Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 808 (1996) (“The argument for . . . self-segregation . . . is also sometimes framed positively: [S]uch segregation improves the ability to share and pass on culture, as well as to develop institutions.”).

Not only are population perfectly segregated in Figure 3, but this spatial clustering is presumed to obtain as the product of free and voluntary choice. Even though members of the minority group are free by assumption to live anywhere they so choose within the jurisdiction, members of this group have freely and voluntarily chosen to cluster according to a specific demographic characteristic, such as religious affiliation, national origin, or race for the support that living together in close spatial proximity as a discrete, well-defined community provides. The minority population has not been intentionally compelled by a hostile majority, either by direct or indirect force, to involuntarily reside in a segregated neighborhood.¹⁵⁷ Instead, members of this minority group have freely and voluntarily chosen to live in a segregated location-based community for their own mutual benefit.¹⁵⁸

Voluntary segregation is not without its critics, however.¹⁵⁹ To many, the distributional outcomes produced by voluntary segregation (for example, the spatial distribution of residents in Figure 3) appear to improperly replicate the intolerable outcomes produced under “Jim Crow” laws and the legal principle of “separate but equal” that mandated racial segregation in all public facilities.¹⁶⁰ Allowing self-segregation under these circumstances is viewed as an endorsement of the separation of society into “competing racial factions” and appears to carry society further from a world “in which race no longer matters,” from a world of true colorblindness.¹⁶¹ There is of course an important difference here, which is that this type of segregation is the consequence of free and voluntary choice. Unlike Jim Crow, the assumption—which is admittedly false in many circumstances—is that members of the minority group are free to

157. See *supra* Part III (describing methods of involuntary segregation).

158. See also *supra* Part IV.A (noting that spatial clustering is assumed to be an act of self-protection, in other words, a defensive response to various forms of violence perpetuated by an oppressive majority group).

159. See, e.g., Frank Bruni, *The Lie About College Diversity*, N.Y. TIMES (Dec. 12, 2015), <https://www.nytimes.com/2015/12/13/opinion/sunday/the-lie-about-college-diversity.html> (arguing that self-segregation on college campuses limits “meaningful interactions between people from different backgrounds”).

160. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (upholding Louisiana law providing for “separate but equal” facilities for African Americans).

161. *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)). See generally Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglas, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 874 (2008) (arguing, *inter alia*, that all forms of segregation are opposed to principles of “substantive integration and equality”).

associate with whomever they so choose: No one group is permitted to exclude members of any other group, be it a minority or majority group. For example, some critics of self-segregation in the educational context mistakenly suggest that safe spaces on college campuses are *only* open to specific groups of minority students.¹⁶² Not only is this suggestion false, but such a policy would likely be unconstitutional under existing Supreme Court jurisprudence.¹⁶³

Rather than analogize self-segregation to Jim Crow, a more meaningful criticism of voluntary residential segregation emphasizes the lack of social interaction between members of different ethnic groups, which results in social costs that may serve to offset the social benefits of spatial clustering. A society suffers when different ethnic groups are isolated and geographically segregated and do not have meaningful, repeated interactions with members of other such groups.¹⁶⁴ Residential integration of diverse minority groups promotes communication between people of different backgrounds and beliefs and leads to important knowledge spillovers and a greater appreciation for and sensitivity towards the varying circumstances of others.¹⁶⁵ Further, there are potential long-term social harms suffered by those who have chosen to live in isolation from other groups. For example, members of segregated communities often lack access to educational or employment

162. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part) (“[U]niversities . . . talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduate ceremonies.”).

163. See *id.* at 334 (majority opinion) (“[A] race-conscious admissions program . . . cannot ‘insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.’” (alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978))).

164. See ERIC M. USLANER, *SEGREGATION AND MISTRUST: DIVERSITY, ISOLATION, AND SOCIAL COHESION* 23 (2012). See generally Alberto Alesina & Eliana La Ferrara, *Ethnic Diversity and Economic Performance*, 43 J. ECON. LITERATURE 762, 781 (2005) (“[Ethnic] fractionalization seems to be associated with poor public policies, low trust, and low city growth.”).

165. See, e.g., Richard Florida et al., *Inside the Black Box of Regional Development—Human Capital, the Creative Class and Tolerance*, 8 J. ECON. GEOGRAPHY 615, 620 (2008) (“[T]olerance and openness to diversity affect the level and geographic distribution of education and skill.”); Michael Storper & Anthony J. Venables, *Buzz: Face-to-Face Contact and the Urban Economy*, 4 J. ECON. GEOGRAPHY 351, 351 (2004) (arguing that face-to-face contact between economically and socially-diverse groups in dense urban environments has social, economic, and psychological benefits).

opportunities and may not be provided with a reasonable opportunity to acquire technical skills and a knowledge of cultural norms necessary to succeed in certain high-wage sectors of the labor market.¹⁶⁶ Under this view, location-based communities are a mobility trap and a barrier to upward economic or social movement: Voluntary self-selection into minority enclaves delays or halts entirely cultural assimilation, preventing those who live in such segregated communities from enjoying the social or economic benefits provided by mainstream institutions.¹⁶⁷

For example, while providing important resources and services that facilitate a powerful and inspiring commitment to religious faith and virtue, certain ultra-Orthodox Jewish communities have been strongly criticized for being overly insular and cut off from modern society to the detriment of its younger generations.¹⁶⁸ Some have argued that the lack of secular education, and of science in particular, has resulted in economic hardship and an undue dependence upon social welfare programs.¹⁶⁹ Even within the Jewish community, the ultra-Orthodox community has been regarded as excessively inward-looking and portrayed as religious extremists.¹⁷⁰ But of course, this insularity is intentional: The expressly stated

166. See Natasha T. Duncan & Brigitte S. Waldorf, *Becoming a U.S. Citizen: The Role of Immigrant Enclaves*, 11 CITYSCAPE, no. 3, 2009, at 5, 24.

167. See Jimmy M. Sanders & Victor Nee, *Limits of Ethnic Solidarity in the Enclave Economy*, 52 AM. SOCIO. REV. 745, 745, 762–66 (1987) (finding that cultural assimilation has a positive impact on the wages of immigrant employees); Duncan & Waldorf, *supra* note 166 (arguing that while well-integrated ethnic enclaves have a positive impact on immigrant outcomes, poorly-integrated enclaves have the opposite effect); see also Yvette Alex-Assensoh, *Race, Concentrated Poverty, Social Isolation, and Political Behavior*, 33 URB. AFFS. REV. 209, 209 (1997) (finding that social isolation undermines political participation); Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286, 296–98 (1993) (arguing that one of the attributes of devastated neighborhoods is social and political isolation).

168. See, e.g., Tamar Rotem, *For Israelis Who Flee the Ultra-Orthodox Fold, a Brave New World*, HAARETZ (Jan. 23, 2016), <https://www.haaretz.com/jewish/premium.magazine-a-family-that-fled-the-ultra-orthodox-fold-1.5393791>.

169. See, e.g., Joe Sexton, *Religion and Welfare Shape Economics for the Hasidim*, N.Y. TIMES, Apr. 21, 1997, at B1; see also Barbara Demick, *Raids in New Jersey Town Target Ultra-Orthodox Jews Accused of Welfare Fraud. 'What Is Going On Here?'*, L.A. TIMES (Sept. 23, 2017, 3:00 AM), <https://www.latimes.com/nation/la-na-new-jersey-orthodox-20170923-story.html> (describing one ultra-Orthodox community's dependence on government assistance).

170. Mick Brown, *Inside the Private World of London's Ultra-Orthodox Jews*, TELEGRAPH (Feb. 25, 2011, 9:00 AM), <https://www.telegraph.co.uk/news/religion/8326339/Inside-the-private-world-of-Londons-ultra-Orthodox-Jews.html>.

objective of many ultra-Orthodox communities is to create and maintain a rigid isolation from secular society, perceiving integration within mainstream modern society as an existential threat to a more religiously observant way of life in which "tradition is held sacrosanct and modernity is largely scorned."¹⁷¹ Although community neighborhoods, such as the ultra-Orthodox, generate important social benefits for those who live within such communities, society, on the whole, benefits when its people are unified and connected. Thus, society functions best when different groups view themselves as active participants collectively engaged in a social enterprise in which there exists robust ongoing social interaction among and exposure to different demographic or socioeconomic groups with the human impulse to spatial cluster in distinct, segregated, sometimes hostile tribes tempered to a certain degree. The optimal level of residential segregation in society balances these social costs of insularity against the social benefits of self-segregation highlighted in Part IV.B.1.

3. Outcome-based Policy Responses

This Subsection considers *outcome-based* policies to promote residential integration and identifies three distinct challenges to this type of *ex post* approach given the possibility of voluntary residential segregation.

a. Social Objective Function Ill-defined

Researchers have developed several formal indices to measure the level of residential segregation in a jurisdiction, such as the index of dissimilarity that measures the evenness with which two groups are distributed across component geographic areas that comprise a larger geographic area or the isolation index that measures that "the extent to which minority members are exposed only to one [an]other" and is computed as the minority-weighted average of the minority proportion in each area.¹⁷² The social objective of maximizing residential integration is operationalized

171. *Id.*

172. See Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281, 284, 288 (1988); see also Douglas S. Massey et al., *The Dimensions of Segregation Revisited*, 25 SOCIO. METHODS & RSCH. 172, 174, 200 (1996) (reaffirming earlier work using 1990 census data).

through the minimization of these measures. For instance, perfect residential integration, as depicted in Figure 1, corresponds to minimization of the dissimilarity measure.¹⁷³ To make the level of residential segregation in Figure 3 a practical enforcement objective of the government (or some other entity), a quantifiable representation of the optimal distributional outcome is arguably necessary: Optimal spatial clustering in a jurisdiction must be defined in terms of the minimization of some specifiable social objective function. To implement an outcome-based approach to promoting residential integration, state and federal housing agencies require some straightforward measure by which to assess the need for or the effectiveness of government interventions in the housing market. The primary virtue of a formal segregation measure, such as the index of dissimilarity or the isolation index, is its simplicity: Using publicly available data, these segregation measures readily identify specific jurisdictions where spatial clustering is relatively high and government intervention may be necessary to correct discrimination in housing or credit markets.¹⁷⁴ These conventional segregation measures provide a quick and easy calculation to identify geographic areas of relatively high spatial clustering by race or ethnicity (or some other demographic variable); though, they may later become the focus of public litigation or investigation.¹⁷⁵

And yet, as discussed, the optimal distributional outcomes identified by these formal indices of residential segregation do not necessarily correspond to the true social optimum if the social benefits of spatial clustering at some point exceed the social costs of such clustering: If spatial clustering has social value, then the true social objective function does not minimize, or reduce to zero, a corresponding index of residential segregation based upon measures of evenness, exposure, or clustering. Instead, the correct objective function at the social optimum likely allows for some non-trivial amount of voluntary self-segregation into location-based communities. Because this optimal level of residential integration is not easily defined, however, and is likely to vary across space and time, the proper social objective function is also not easily defined,

173. Massey & Denton, *supra* note 172, at 283-84.

174. See, e.g., Kelly DeRango, *Discrimination and Segregation in Housing*, EMP. RSCH. NEWSL. (Kalamazoo, Mich.), July 2001, at 1 (demonstrating how the dissimilarity index is used to identify highly segregated communities).

175. See, e.g., *id.* at 3-4.

and the social optimum cannot straightforwardly be derived as the maxim and of a simple, cleanly-specified social welfare function.

Moreover, not all residential segregation is the same, and more specifically, some spatial clustering may obtain as the product of truly voluntary choice as discussed earlier.¹⁷⁶ Consequently, it is not enough to identify specific areas of relatively high residential segregation; the underlying causes of such observed spatial clustering must be further investigated and examined, and those causes that are socially negative must be distinguished from those that are not. Residential segregation that is in large part voluntary does not require the same affirmative government response as residential segregation that is the product of exclusionary practices that severely limit freedom of choice in housing. Current segregation measures, however, do not classify or distinguish different types of spatial clustering in relation to the underlying causal determinants of such clustering but instead condemn any and all observed patterns of residential segregation *ex post*—and equally so. Given the extent to which resources devoted to public enforcement are limited, the failure to more closely examine the causal choice-based determinants of residential segregation implies that geographic areas of greatest need may go overlooked, and local communities in which government intervention may be most effective may not be rightly prioritized.

b. Problems of Scale

The social benefits of location-based community also suggest that efforts to increase residential segregation must be undertaken at a sufficiently large scale. If the social objective is strictly residential integration, then moving even a single minority individual from a disproportionately *minority* neighborhood to a disproportionately *majority* neighborhood is social welfare increasing. On the other hand, if the socially-optimal outcome represents a subtle balancing of social costs and benefits (as in Figure 3), then the social impact of relocating this one individual is not immediately clear. While the move from a minority to majority neighborhood is socially positive insofar as this relocation increases residential integration, the relocation may also be socially negative insofar as this individual no longer enjoys the benefits of living in a supportive, socially-cohesive neighborhood. To maintain the social benefits of location-based

176. See *supra* Part II.B.

communities, such programs may need to relocate a fairly large number of people to the same area in roughly the same time period, which is likely to increase the administrative burden of the program and to intensify the push back from communities resistant to an influx of outsiders, especially an influx that is large and relatively sudden.

This observation is not new and has been made by several scholars in connection with government-sponsored programs, such as the Moving to Opportunity for Fair Housing ("MTO").¹⁷⁷ The MTO was a randomized social experiment sponsored by the federal government from 1994 to 1998 in which HUD provided public housing residents in Baltimore, Chicago, Boston, New York, and Los Angeles with vouchers to leave public housing and move to private housing within the same city but in significantly more affluent neighborhoods.¹⁷⁸ Although the voucher recipients lived in lower-crime neighborhoods and generally had better residential units than families in the control group, the experiment had no observable impact upon educational attainment.¹⁷⁹ In addition, employment was *lesser* among voucher recipients during the first two years of the study.¹⁸⁰ Although the initial negative effects attenuated over time, there were no statistically significant observable gains in longer-term employment rates and earnings throughout the duration of the study.¹⁸¹

Scholars have attributed these unexpected drops to disruptions of social networks, emphasizing the difference between neighborhoods and communities.¹⁸² "Those who planned the MTO experiment believed [the program] could reduce the 'social isolation' that was, argued leading scholars, a core feature of life in

177. See generally Mark Shroder, *Moving to Opportunity: An Experiment in Social and Geographic Mobility*, 5 CITYSCAPE, no. 2, 2001, at 57 (describing the MTO program).

178. *Id.* at 58.

179. Lisa Sanbonmatsu et al., *Neighborhoods and Academic Achievement: Results from the Moving to Opportunity Experiment*, 41 J. HUM. RES. 649, 682 (2006).

180. LISA SANBONMATSU ET AL., U.S. DEP'T OF HOUS. & URB. DEV., MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION 149 (2011).

181. *Id.* at 257. But see Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855 (2016) ("[M]oving to a lower-poverty neighborhood when young (before age [thirteen]) increases college attendance and earnings and reduces single parenthood rates").

182. See, e.g., XAVIER DE SOUZA BRIGGS ET AL., MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY 109 (2010).

segregated, high-poverty ghetto neighborhoods.”¹⁸³ Unfortunately, “MTO families almost never ‘converted’ a new location into significant new social resources. . . . thwart[ing] hopes that relocation away from ghetto neighborhoods would generate better access to information about good housing, schools, jobs, and other opportunities.”¹⁸⁴ The results of this social experiment support the proposition that the social costs of living without the support of a local community and the personal stress created as a result can sometimes exceed the social benefits of living in improved economic surroundings. As Professor Smithsimon astutely notes, “[A] few hundred dollars is nothing compared with the worry that you, your spouse, or your kid will be harassed by the police[] or the concern that your child will be singled out as trouble in school.”¹⁸⁵ Public efforts to increase residential integration, such as the MTO Program, likely better operate not at the individual level but at the group level. For these types of programs to achieve optimal results, a sufficiently large number of people may need to be relocated at roughly the same time to the same higher-income neighborhood such that a program participant still believes that she is meaningfully connected to a socially-cohesive community after relocating and has not become an isolated, unwelcomed outsider alone in a higher-income neighborhood of potentially hostile majority aggressors who do not care and do not want her there.

c. Substituting Public Preferences for Private Preferences

The larger problem, however, with an outcome-based approach to residential segregation in which the sole objective is greater residential integration is that the individual preferences of those provided with housing assistance can too often be ignored. Consider public housing for example. The question of where to locate public housing has proven to be one of the most vexing in constructing government-sponsored affordable housing. As discussed in Part III.A.2, public housing is often held up as an example of a failed social policy that confined people of color in poorly-maintained vertical ghettos.¹⁸⁶ Many have argued that public housing has served

183. *Id.* at 113.

184. *Id.* at 133.

185. Smithsimon, *supra* note 99.

186. See, e.g., LAWRENCE J. VALE, PURGING THE POOREST: PUBLIC HOUSING AND THE DESIGN POLITICS OF TWICE-CLEARED COMMUNITIES 3 (2013).

to isolate and segregate certain racial or ethnic minorities and that policy elites only helped to increase racial and ethnic discrimination in society through their choices of where to site public housing and how best to populate these public developments.¹⁸⁷

The problem with this argument, however, is that siting public housing in predominantly-white neighborhoods may not actually represent the preferences of those who would in fact reside in such housing developments. As Roy Innis of the Congress of Racial Equality has argued:

The integrationists would have us disperse to the suburbs. Many of us are resisting that because we feel that we cannot maximize our power that way. Those who want to go to the suburbs—we will fight for their right to do that. But we would oppose any massive program to move us there.¹⁸⁸

Reverend A. I. Dunlap, a well-known black clergyman, has similarly observed: “[W]e have to move toward building up our own communities The federal freeze is just trying to force us out toward the suburbs, and black people don’t want that any more than whites welcome our coming.”¹⁸⁹ More recently, Houston Mayor Sylvester Turner has echoed the sentiment that people often cherish and value their neighborhoods despite—or perhaps because of—its segregated nature during his ongoing battle with HUD over the siting of a low-income housing tax credits (“LIHTC”) development in

187. See, e.g., Adam Bickford & Douglas S. Massey, *Segregation in the Second Ghetto: Racial and Ethnic Segregation in American Public Housing: 1977*, 69 SOC. FORCES 1011, 1012 (1991); John Goering et al., *Recent Research on Racial Segregation and Poverty Concentration in Public Housing in the United States*, 32 URB. AFFS. REV. 723, 741 (1997); William M. Rohe & Lance Freeman, *Assisted Housing and Residential Segregation: The Role of Race and Ethnicity in the Siting of Assisted Housing Developments*, 67 J. AM. PLAN. ASS'N 279, 290-91 (2001) (discussing residential segregation prior to the 1980s). See generally ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO: 1940-1960* (2009).

188. Lance Freeman, *The Siting Dilemma*, in *FACING SEGREGATION: HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY* 35, 45 (Molly W. Metzger & Henry S. Webber eds., 2019) (citation omitted).

189. Freeman, *supra* note 188; Robert McClory, *Row over Austin Rule: Blacks Trapped in Housing Fight*, CHI. DAILY DEF., Mar. 7, 1972, at 4.

a predominantly-black neighborhood of Houston.¹⁹⁰ The Mayor has argued that:

When you no longer build affordable housing in these low-income communities, then you are participating in the closing and consolidation of these schools, which impacts communities. You don't get that growth and that development with the people there, maintaining that history, that culture, that personality of those neighborhoods, and so you force people out.¹⁹¹

Some black developers have gone so far as to accuse HUD of "a conspiracy to deprive the black community of all decent low-income housing."¹⁹² Regarding a Chicago housing development, for example: "HUD density factor and site selection criteria make it impossible for new low or middle-income buildings to be built in the inner city," allowing wealthy private developers, mostly white, to purchase land with private money for a largely white clientele.¹⁹³ The contention that HUD's siting and neighborhood standards do not accurately reflect the preferences of minority communities is reflected not only in public statements but also in where minority groups have chosen to use LIHTC. For example, across the United States, black churches have used LIHTC to develop affordable housing and rebuild devastated black communities.¹⁹⁴ Community development corporations, disproportionately located in black neighborhoods,¹⁹⁵ have also used LIHTC as a major source of revenue to rebuild local communities and fund the development of affordable housing.¹⁹⁶ To wit, Congressman Rangel is said to have brought "the tax bacon

190. See Rebecca Elliot, *Turner, Feds Clash over Affordable Housing Policies*, HOUS. CHRON., <https://www.houstonchronicle.com/news/politics/houston/article/Turner-feds-clash-over-affordable-housing-10891783.php> (last updated Jan. 29, 2017, 12:17 PM).

191. *Id.*

192. Freeman, *supra* note 188, at 46.

193. *Id.* at 46-47.

194. See, e.g., MICHAEL LEO OWENS, *GOD AND GOVERNMENT IN THE GHETTO: THE POLITICS OF CHURCH-STATE COLLABORATION IN BLACK AMERICA* 7, 41 (2007).

195. See HARRY EDWARD BERNDT, *NEW RULERS IN THE GHETTO: THE COMMUNITY DEVELOPMENT CORPORATION AND URBAN POVERTY* 8, 30 (1977).

196. See Sara E. Stoutland, *Community Development Corporations: Mission, Strategy, and Accomplishments*, in *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* 193, 199 (Ronald F. Ferguson & William T. Dickens eds., 1999).

home" for his role in authorizing the legislation that promulgated LIHTC.¹⁹⁷

Housing experts describe the siting of public housing as representing a "dilemma," pitting the desire to dismantle the "walls" of segregated residential communities against the economic benefits that affordable housing can bring to segregated minority communities.¹⁹⁸ This dilemma, however, is largely false. The question is not where to site affordable housing to best promote the aspirational goals of state and federal housing authorities. Rather, the question is where to site affordable housing in a way that best reflects the individual preferences of those who will live in such housing. To the extent that there exists a dilemma, the dilemma consists in attempting to replicate a distribution that reflects these unobservable preferences. Because the optimal distribution is not well-defined, this Article contends that the best way to do so is to focus upon the concept of fair choice in housing. Rather than attempt to implement a particular distributional outcome through the siting of public housing (or through some other state-sponsored means) that the government believes best reflects the socially-optimal level of residential integration, the government should instead focus upon the causal determinants of residential segregation, and isolate and eliminate those exclusionary barriers that restrict freedom of choice in a discriminatory manner. With these barriers removed, the socially-optimal level of spatial clustering will then obtain as the byproduct of free and voluntary choice.

The government must not dictate where people live, especially not well-meaning policy elites who themselves tend to live in relatively homogenous residential communities. Substituting government preferences for private preferences is unlikely to replicate the socially-optimal level of residential segregation, particularly given the extent to which policy advocates are unable to agree among themselves as to what constitutes the social optimum. As noted, some fair housing advocates emphasize the value of placing new housing opportunities in "high-opportunity" neighborhoods (mobility strategies), while others, by contrast, emphasize the value of using affordable housing developments as

197. Freeman, *supra* note 188, at 49 (citation omitted).

198. See John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1495 (1993) (asserting that opportunities in housing should include the "choice to overcome opportunity-denying circumstances while continuing to live in black communities").

investments to rebuild and revitalize historically disadvantaged communities (place-based strategies).¹⁹⁹ This debate can be largely resolved, however, by amplifying the role that minority groups, whose political position may be relatively weak compared to the majority population, play in determining the location of government-sponsored affordable housing. In the end, affordable housing must be located where those who will live in such housing prefer and not where those in power, often members of the majority population, believe will best help eliminate racial or ethnic discrimination in the long run no matter how well-intentioned those beliefs undoubtedly are.

The importance of satisfying community preferences is in fact captured in the AFFH Rule itself, which requires community participation, consultation, and coordination in the development of an AFH.²⁰⁰ “The goal of community engagement in the development of the AFH is to create a [final] product that is informed and supported by the entire community and establishes a standard for inclusive decision making.”²⁰¹ As HUD notes, this requirement is vitally important because all too often these preferences are not given a voice politically, which has led to a broadly-held distrust “rooted in negative experiences with planning in the past[.]” community members have too often been “excluded from weighing in on decisions that impact their daily lives, particularly low-income persons, communities of color, and persons with disabilities.”²⁰² The community engagement requirement of the AFH process is designed to help program participants develop a better understanding of the history, context, and needs of a community, especially where specific community groups have not previously been involved in the planning or decision-making processes.²⁰³

Unlike segregationists who sometimes falsely justify or portray the existence of residential segregation as the product of free and voluntary choice, integrationists often argue that fair housing should

199. See Sandra M. Moore, *Ferguson: Undoing the Damage of the Past—Creating Community Wealth*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 297, 300 (2017); John A. Powell & Stephen Menendian, *Opportunity Communities: Overcoming the Debate over Mobility Versus Place-based Strategies*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 207*, 221–22 (Gregory D. Squires ed., 2018).

200. See U.S. DEPT OF HOUS. & URB. DEV., *AFFIRMATIVELY FURTHERING FAIR HOUSING RULE GUIDEBOOK 23* (2015).

201. *Id.* at 24.

202. *Id.*

203. *Id.*

not unduly concern itself with satisfying the individual choices of a given minority community. In their view, the integration mandate of the FHA has never been solely a matter of fulfilling the individual choices of African Americans or other minority groups.²⁰⁴ Rather, the FHA is to be interpreted as a mandate to promote residential integration in large part because of integration's long-run benefits to society.²⁰⁵ Lack of enthusiasm or even explicit opposition to residential integration at the individual level is not alone sufficient to justify governmental support of segregation.²⁰⁶ While individuals are free to self-segregate, integrationists contend that the government may not effectuate or perpetrate that choice.²⁰⁷ In a world where discrimination and prejudice against certain minority groups continues to exist, the claim is that the government must, as a second-best alternative to eliminating such discrimination outright, force the population to integrate under the stated assumption that the long-run benefits of greater residential integration exceed the short-run costs of lesser choice in housing.

In theory, the premise underlying this argument may be correct. Forcibly integrating the population may very well do more to eliminate racial or ethnic discrimination than choice-based alternatives to residential segregation. By forcing people to live together and preventing self-segregation into isolated minority enclaves, society may achieve a net benefit from increased social interaction among different groups and exposure to competing viewpoints and beliefs. Forcible integration may be the most expedient mean by which to eliminate the terrible scourge of racial and ethnic bigotry from human existence. And yet, in a liberal society in which the rights and freedoms of the individual are held sacrosanct in almost all circumstances, people cannot be employed by the government as a mean to an end no matter how noble or righteous that end.²⁰⁸ Efforts undertaken by the government to influence attitudes and social behaviors on a large scale to produce certain desired characteristics in the population is the very

204. OPPORTUNITY AGENDA, MEMORANDUM: THE RELATIONSHIP BETWEEN RACIAL INTEGRATION AND THE DUTY TO FURTHER FAIR HOUSING 7-8 (2010).

205. *Id.* at 8.

206. *Id.*

207. *Id.*

208. See generally Maurice Cranston, *Liberalism*, in 34 THE ENCYCLOPEDIA OF PHILOSOPHY 458 (Paul Edwards ed., 1967).

definition of social engineering.²⁰⁹ As Ben Carson, the former U.S. Secretary of HUD, has stated:

These *government-engineered* attempts to legislate racial equality create consequences that often make matters worse. There are reasonable ways to use housing policy to enhance the opportunities available to lower-income citizens, but based on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous.²¹⁰

While accompanying statements understate the potentially positive role of government in promoting residential integration, Carson is surely right in stating that the government must not use certain of its citizens, especially those most vulnerable to oppression by a dominant majority, as involuntary instruments through which to implement or realize broad social policy ambitions. The choice to participate in such efforts must always remain firmly with the individual: Freedom of choice is inviolable under these circumstances.

Free and voluntary choice empowers the individual and constitutes an indispensable part of that which fundamentally makes us human. Much that a human being does daily is not in the best long-run interest of society and reflects varied forms of human weakness and imperfection. The choice to self-segregate by race or religious affiliation or national origin or along some other dimension likely represents precisely such human failings. Society would surely

209. See generally EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988) (arguing that the U.S. media is a tool used for social coercion through its use of propaganda techniques); 2 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: THE HIGH TIDE OF PROPHECY* (4th ed. 1971) (criticizing the rhetoric of Hegel and Marx as the root of totalitarianism experienced in the early half of the twentieth century).

210. Ben S. Carson, *Experimenting with Failed Socialism Again*, WASHINGTON TIMES (July 23, 2015), <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> (emphasis added); see also Thomas B. Edsall, *Where Should a Poor Family Live?*, N.Y. TIMES (Aug. 5, 2015), <https://www.nytimes.com/2015/08/05/opinion/where-should-a-poor-family-live.html> (describing opponents' claims that HUD's AFFH rule constitutes "social engineering"). See generally Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (2007) (discussing the housing desegregation cases and the work of housing desegregation activists).

be better off with greater social interaction and exposure to different minority groups, and efforts to promote such integration are unquestionably admirable and socially beneficial.²¹¹ And yet, these social objectives cannot be achieved at the cost of human dignity; progress cannot come at the expense of the degradation of the rights of the individual. Despite what integrationists might contend, freedom of choice and the individual's inviolable right of self-determination cannot be so readily relinquished in pursuit of the greater long-run common good.

Accordingly, the primary objective of state and federal fair housing policy must be more modest. Rather than project onto the population its particular view of the optimal distributional outcome, the government should adopt a choice-based approach to residential segregation instead of an outcome-based approach, focusing on the underlying causal determinants of residential segregation and in particular striving to maximize fair housing choice and empowering minority groups with the choice to live wherever and among whomever they so desire even if this greater choice comes at the expenses of less residential integration in the short run. The optimal distribution must be a function of individual preference and not the invention of well-intentioned policy elites with sweeping visions of a better society that may be completely divorced from the individual preferences of those whom such elites mean to assist.

This Article contends that the duty to AFFH should not be interpreted as imposing an affirmative outcome-based duty on the part of state and federal housing authorities to implement specific patterns of residential segregation. Not only is there an absence of agreement on what that optimal distribution may be, but any distribution imposed by the government may not reflect the individual preferences of those whom the government intervention is intended to help. Rather than fashion some compromise between mobility strategies and place-based strategies, both of which represent outcome-based policy approaches to fair housing, the better approach is to disregard outcomes altogether and to focus instead on the causal determinants of such outcomes, and in particular, on maximizing fair housing choice.²¹²

211. See Storper & Venables, *supra* note 165.

212. See Moore, *supra* note 199, at 308.

4. Choice-based Policy Responses

This Subsection considers a *choice-based* approach to promoting residential integration. A choice-based policy response seeks to maximize fair housing choice. Fair housing choice implies that “individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination” or other barriers related to protected characteristics.²¹³ “Fair housing choice encompasses: (1) [a]ctual choice, which means the existence of realistic housing options; (2) [p]rotected choice, which means housing that can be accessed without discrimination; and (3) [e]nabled choice, which means realistic access to sufficient information regarding housing options so that any choice is [rationally] informed.”²¹⁴

a. Eliminate Restrictions on the Choice Set

The most important component of a choice-based approach to residential integration is to eliminate certain forms of intentionally exclusionary behavior, such as exclusionary zoning ordinances that artificially restrict the supply of housing.²¹⁵ To increase the number of dwellings in certain communities, state governments can impose state-wide limits on local land use laws that exclude affordable housing and encourage municipalities to prohibit the use of zoning ordinances that serve to exclude traditional victims of discrimination, including people who are not citizens of the United States.²¹⁶ For example, in Massachusetts and Connecticut, municipalities in which less than 10% of the existing housing stock is affordable to households at 80% of the area median income are subject to a builder’s remedy.²¹⁷ Specifically, a developer of mixed-income housing enjoys a simplified application process for zoning

213. See 24 C.F.R. § 5.152 (2020).

214. *Id.*

215. See Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1&session=1>.

216. See U.N. GAOR, Rep. of the Comm. on the Elimination of Racial Discrimination, at 97, U.N. Doc. A/59/18 (2004) (“Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices[.]”).

217. CONN. GEN. STAT. § 8-30g(f) (2020); MASS. GEN. LAWS ch. 40B, § 22 (2020).

approvals and permits.²¹⁸ Additionally, provided this zoning application is denied, the developer further has the right to have an appeal of the denial adjudicated under a relatively favorable standard of review.²¹⁹ Similarly, the judiciary should consider weakening the standing requirements that must be satisfied to challenge certain zoning ordinances. Currently, a plaintiff has standing to challenge exclusionary zoning practices only if there exists a substantial probability that the plaintiff could have lived in the municipality *but for* the challenged land use policies or practices.²²⁰ This standing requirement makes it extremely difficult to challenge exclusionary zoning in the absence of a specific development proposal that has been blocked through enactment of a specific ordinance.²²¹

b. Expand the Choice Set

In addition to reducing legal barriers to voluntary choice, the government should also take steps to expand the choice set of available affordable housing alternatives. The emphasis on choice is the principal benefit of the federal government's Housing Choice Voucher ("HCV") Program.²²² A successful housing choice voucher program is a key element of a choice-based approach to promoting residential integration; empirical evidence suggests that housing vouchers have helped reduce rent burdens and improved housing affordability.²²³ Specifically, the HCV Program (also referred to as the Section 8 Voucher Program) is a tenant-based rental voucher program administered by HUD under which local PHAs issue approximately 2.2 million housing vouchers nationwide to income-

218. See CONN. GEN. STAT. § 8-30g(f); MASS. GEN. LAWS ch. 40B § 21.

219. See CONN. GEN. STAT. § 8-30g(f); MASS. GEN. LAWS ch. 40B, § 22.

220. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); *Warth v. Seldin*, 422 U.S. 490, 504 (1975); see also *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40-46 (1976) (dismissing indigent plaintiffs' complaint based on a lack of standing due to the actions of defendants being too remote and indirect to cause the plaintiffs' harm). Likewise, housing authorities should more aggressively prosecute incidents of discriminatory steering. The United States Department of Justice should increase resources dedicated to investigating and prosecuting exclusionary forms of steering. Moreover, to ensure that violations discovered through the testing program are remedied, the Department of Justice must in turn significantly increase the number of civil enforcement cases filed.

221. See generally Anne Josephson & Alice Sessions Lonoff, *Standing to Challenge Exclusionary Zoning in the Federal Courts*, 17 B.C. INDUS. & COM. L. REV. 347 (1976) (concluding that the Supreme Court of the United States is unlikely to rule that exclusionary zoning is *per se* unconstitutional).

qualified households, who then find privately-owned housing units to rent.²²⁴ Recipients use vouchers to pay for housing units on the private market, contributing 30% of their income towards rent while the federal government pays the remainder up to the local maximum payment standard set between 90% and 110% of the Fair Market Rent (“FMR”).²²⁵ The FMR is defined as either the fortieth or fiftieth percentile of rents in the metropolitan area, depending upon existing market conditions.²²⁶ After receiving a voucher, households have only a limited time period during which the voucher must be used (at least sixty days).²²⁷ Voucher recipients must find units that are of the appropriate size, meet federal housing quality standards, and charge a rent that the local housing authority deems reasonable given local market conditions.²²⁸

Unfortunately, voucher holders frequently encounter landlords unwilling to rent to voucher holders.²²⁹ In response, thirteen states and a number of municipalities have passed “source of income” discrimination laws that prohibit landlords from discriminating against voucher holders.²³⁰ Examples of jurisdictions that prohibit such discrimination include Connecticut,²³¹ Massachusetts,²³² Washington, D.C.,²³³ and Chicago, Illinois.²³⁴ That some jurisdictions, such as New York City, continue to permit

222. *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Feb. 21, 2021).

223. See, e.g., ABT ASSOCS. INC. ET AL., U.S. DEP’T OF HOUS. & URB. DEV., EFFECTS OF HOUSING VOUCHERS ON WELFARE FAMILIES 5, 131–32 (2006); Brian A. Jacob & Jens Ludwig, *The Effects of Housing Assistance on Labor Supply: Evidence from a Voucher Lottery*, 102 AM. ECON. REV. 272, 281 (2012).

224. See CTR. FOR BUDGET & POL’Y PRIORITIES, HOUSING CHOICE VOUCHER FACT SHEETS 1 (2017).

225. Ingrid Gould Ellen, *What Do We Know About Housing Choice Vouchers?*, REG’L SCI. & URB. ECON., Jan. 2020, at 1, 1.

226. *Id.*

227. *Id.*

228. *Id.*

229. See J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE, no. 1, 2017, at 3, 5.

230. See generally POVERTY & RACE RSCH. ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2018) (listing the state, local, and federal statutes prohibiting discrimination in the housing market based on source of income).

231. CONN. GEN. STAT. § 46a-64c (2020).

232. MASS. GEN. LAWS ch. 151B, § 4(10) (2020).

233. D.C. CODE § 2-1402.21(a)(1), (7) (2020).

234. CHI., ILL., MUN. CODE § 5-08-030 (2020).

discrimination with respect to tenants' source of income is unacceptable, especially given politicians', including Mayor Bill DeBlasio, publicly stated commitment to affordable housing.²³⁵ Even if such discrimination is prohibited by law, enforcement of the law in practice is often weak.²³⁶ Several local audit studies have found that landlords discriminate against voucher holders even in jurisdictions with "source of income" discrimination laws.²³⁷ For instance, a study of housing choice vouchers in Chicago found that "discrimination against Section 8 holders appears to be disturbingly common,"²³⁸ even though discrimination against such voucher holders is illegal under both the Chicago Fair Housing Ordinance and Cook County Human Rights Ordinance.²³⁹ To expand the set of available affordable housing options, localities must pass laws that expressly prohibit discrimination based upon "source of income," and those localities that have enacted such laws must devote increased resources to enforcement of these important anti-discrimination protections.

In addition to discrimination against voucher holders, a number of studies have found that a lack of affordable rental housing available to those with housing vouchers prevents voucher holders from relocating to newer, better-quality neighborhoods.²⁴⁰ For instance, boosting landlord outreach and simplifying various program rules would help voucher households reach a wider, more diverse set of neighborhoods.²⁴¹ Researchers have found that voucher

235. See, e.g., Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES (Oct. 30, 2007), <https://www.nytimes.com/2007/10/30/nyregion/30section.html>.

236. See, e.g., Tighe et al., *supra* note 229, at 8–9.

237. See, e.g., CHI. LAWS.' COMM. FOR C.R., FINAL REPORT: FAIR HOUSING TESTING PROJECT FOR THE CHICAGO COMMISSION ON HUMAN RELATIONS 11 (2018); LAWS.' COMM. FOR BETTER HOUS., LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDERS 3, 8 (n.d.).

238. LOC. PROGRESS, POLICY FOR LOCAL PROGRESS: CASE STUDIES & BEST PRACTICES FROM AROUND THE COUNTRY 16 (n.d.).

239. See, e.g., LAWS.' COMM. FOR BETTER HOUS., *supra* note 237, at 3.

240. See, e.g., JENNIFER COMEY, HOPE VTD AND ON THE MOVE 2–3 (2007); Victoria Basolo & Mai Thi Nguyen, *Does Mobility Matter? The Neighborhood Conditions of Housing Voucher Holders by Race and Ethnicity*, 16 HOUS. POLY DEBATE 297, 297, 316–17 (2005); cf. Michael D. Eriksen & Amanda Ross, *Housing Vouchers and the Price of Rental Housing*, 41 AM. ECON. J.: ECON. POLY 154, 175 (2015) (finding that recipients initially lease in nearby units to secure the subsidy while continuing to search for housing in lower poverty neighborhoods).

241. Ellen, *supra* note 225, at 4; see also Eva Rosen, *Rigging the Rules of the Game: How Landlords Geographically Sort Low-income Renters*, 13 CITY & CMTY.

recipients are often discouraged and overwhelmed by the housing search process and have difficulty finding suitable housing in tight real estate markets.²⁴² To expand the set of neighborhoods in which voucher holders choose to reside, housing authorities should also offer more information to voucher holders about local neighborhoods and schools and provide recipients of housing choice voucher holders with more representative lists of available housing units. Allocation systems must also be refined. For instance, researchers have rightly questioned whether waiting lists are the optimal manner by which to allocate housing vouchers.²⁴³ Finally, federal housing assistance in general falls woefully short of needs with fewer than one in four eligible households receiving some form of public subsidies.²⁴⁴ To expand its reach, the HCV program could provide either smaller or more time-limited subsidies to a much larger percentage of income-eligible households.²⁴⁵

c. Modify the Choice Set

In addition to expanding the choice set of available affordable housing alternatives, the government can further promote residential integration by affirmatively modifying this choice set and incentivizing certain residential location decisions through public subsidies or other programs. For example, in 2011, HUD launched a Small Area Fair Market Rent (“SAFMR”) demonstration program to encourage greater residential integration.²⁴⁶ Under this program, the voucher payment standard is set at the zip code level rather than at the level of the entire metropolitan region in order to expand the number of neighborhoods with units renting below the SAFMR.²⁴⁷ For a voucher program to work properly, voucher holders must have an adequate supply of decent, safe, and sanitary rental units from

310, 335–36 (2014) (arguing that landlord tactics shape and constrain residents’ choices in housing).

242. See 1 MERYL FINKEL ET AL., STUDY ON SECTION 8 VOUCHER SUCCESS RATES: QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS ch. 2, at 8 (2001); Basolo & Nguyen, *supra* note 240, at 317.

243. See, e.g., Robert Collinson et al., *Low-income Housing Policy*, in 2 ECONOMICS OF MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 59, 98–99 (Robert A. Moffit ed., 2016).

244. See Ellen, *supra* note 225, at 4.

245. *Id.*

246. See Peter B. Kahn & Geoffrey B. Newton, *The Small Area FMR Demonstration*, 15 CITYSCAPE, no. 1, 2013, at 325, 327.

247. See *id.* at 326.

which to choose. In theory, smaller area SAFMRs increase the maximum voucher subsidy in high-rent neighborhoods and lowers the maximum subsidy in low-rent neighborhoods.²⁴⁸ The HCV Program is designed to allow assisted households to choose among a wider set of different neighborhoods: In raising the maximum subsidy amount, voucher holders are provided access to higher quality units that command higher rents and, in turn, to a more diverse and truly representative set of housing options within the metropolitan region.²⁴⁹ In general, empirical studies largely confirm that these incentive programs tend to operate as expected, significantly increasing the pool of residential units available to housing choice voucher holders in high-opportunity neighborhoods.²⁵⁰

If housing units continue to remain unavailable to voucher recipients in certain high-opportunities neighborhoods, then housing authorities adopting a more interventionist approach to promoting residential integration could site public housing in these areas (or encourage the construction of low-income housing through the LITHC program). Under a choice-based approach, however, the location of this housing must be responsive to individual consumer demand as people choose where to live based upon individual preferences. The central feature of any public initiative to promote residential integration must be expanding the set of affordable housing alternatives. Affordable housing units must be available across a representative cross section of different housing alternatives within a jurisdiction.²⁵¹ Presented with a representative set of affordable housing options, an individual can then choose which among these alternatives is optimal given individual preferences with respect to residential location. In theory, this competition for residents should incentivize providers of

248. *See id.*

249. *See, e.g.,* Martha M. Galvez, WHAT DO WE KNOW ABOUT HOUSING CHOICE VOUCHER PROGRAM LOCATION OUTCOMES? 1 (2010).

250. *See* MERYL FINKEL ET AL., U.S. DEP'T OF HOUS. & URB. DEV., SMALL AREA FAIR MARKET RENT DEMONSTRATION EVALUATION: INTERIM REPORT, at vii–viii (2017).

251. Of course, many low-income people would consider themselves fortunate to live in public housing no matter where such housing is located given the limited number of units available. *See, e.g.,* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 59 (2016) (noting that most poor people in America do “not live in public housing or apartments subsidized by vouchers” and that “[t]hree in four families who qualified for assistance received nothing”).

government-sponsored affordable housing to provide the best services possible; if an individual provider fails to do so, then recipients of affordable housing units empowered through meaningful access to a reasonable choice of different housing options can freely choose to relocate to other relatively superior housing alternatives, including possibly in the private housing market through use of housing choice vouchers.

Supposing a member of a minority group moves into a relatively homogenous community of the relevant majority group, this relocation must reflect an informed choice among a set of viable affordable housing alternatives to the fullest extent fiscally possible. Promoting affordable housing in geographic areas where people do not want to reside does not meaningfully expand the choice set of such individuals. This approach may lead to greater residential integration in some cases, but those who have relocated to these areas are not necessarily made better off in the long run.²⁵² Accordingly, the AFFH mandate of the FHA should not be understood as a duty to establish or maintain specific patterns of residential integration; rather, the objective must be to maximize freedom of choice. Moreover, public efforts to provide comprehensive affordable housing must be informed by the individual preferences of those who will live in such housing. Fair housing is not affirmatively furthered if additional housing alternatives are provided in areas where people do not want to live, be it through the siting of public housing or by some other means regardless of whether the overall level of residential integration increases as measured by certain formal segregation indices.

In sum, under a choice-based approach to residential integration, the responsibility to AFFH must be interpreted as a responsibility to promote fair housing choice, to protect and enable freedom of choice, to enlarge the set of affordable housing options to include as many desired alternatives as possible, and not as an outcome-based mandate to site affordable housing in a limited number of areas that best implements certain patterns of residential integration considered socially optimal *ex post* by well-meaning policy elites. The duty to AFFH must be a duty to understand in which local communities within a jurisdiction those who are in need of affordable housing truly want to live and to expand or modify the set of affordable housing choices to encompass as many of these desired locations as is fiscally feasible. The government must attempt to

252. See Sanbonmatsu et al., *supra* note 179.

understand the underlying individual preferences of those who will live in affordable housing and must, to an extent reasonably feasible, expand or modify the set of housing alternatives to include those local communities in which there is a demand for housing that has been persistently frustrated by certain types of exclusionary policies and practices.

The primary objective must be to provide people with the freedom to choose across a diverse set of affordable housing options that do not simply promote residential integration but more importantly, truly represent places where people want to live. Over time, the optimal outcome with respect to residential integration, which is likely to vary across time and space, will reveal itself through an accumulation of individual housing choices freely and voluntarily made. Rather than attempt to estimate and implement such unobservable *ex post* outcomes, the better approach is choice-based and to allow patterns of residential segregation to obtain as the product of free and voluntary choice: What is paramount is expanding or in some cases modifying the set of available affordable housing choices to include local communities in which recipients of affordable housing truly want and would choose if given the opportunity to reside in.

C. *A Choice-based Case Against Gentrification*

This Section contends that criticisms of gentrification are implicitly grounded in a choice-based view of residential integration. The best argument against gentrification is fundamentally an argument about restricting freedom of choice in housing and more specifically, about infringing upon the right to choose to voluntarily segregate in relatively homogenous location-based communities.

1. Socially-negative Gentrification

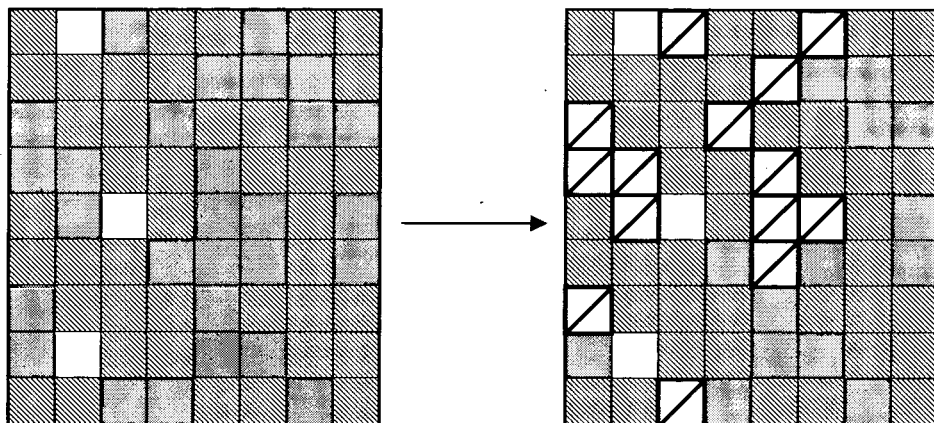
Gentrification has been defined as “the transformation of neighborhoods from low value to high value,” in which the “change has the potential to cause displacement of long-time residents and businesses. . . . when long-time or original neighborhood residents move from a gentrified area because of higher rents, mortgages, and property taxes.”²⁵³ Under this definition, gentrification has a

253. HEALTH EFFECTS OF GENTRIFICATION, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/healthypplaces/healthtopics/gentrification.htm> (last updated Oct.

negative social impact only if the process of gentrification results in the involuntary displacement of lower-income residents by relatively higher-income households through rent or price increases: A change of residence *involuntarily* imposed upon people who lack resources to properly cope creates significant social costs.²⁵⁴

This type of socially-negative gentrification is depicted in Figure 4.

Figure 4. Socially-negative Gentrification



On the left, the white cells represent residential space occupied by the majority group and the solid black cells represent residential space occupied by the minority group. Cells with thin diagonal lines correspond to undeveloped or unoccupied residential space. On the right, the cells with bold borders and a bold diagonal line signify involuntary displacement of existing residents. The principal negative social consequence of gentrification in Figure 4 is the involuntary displacement of low-income existing residents. As

15, 2009); see also Jeffrey Lin, *Understanding Gentrification's Causes*, 2 ECON. INSIGHTS, no. 3, 2017, at 9, 9 (using the term gentrification to refer to increased investment and an influx of residents of higher socioeconomic status into a lower socioeconomic status neighborhood).

254. See, e.g., Vivian Yee, *Gentrification in a Brooklyn Neighborhood Forces Residents to Move On*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/29/nyregion/gentrification-in-a-brooklyn-neighborhood-forces-residents-to-move-on.html> (stating that longtime African American and West Indian tenants have been muscled out by surging rents); see also Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 238, 238–39 (2007) (arguing for a balance between gentrifying and revitalizing low-income neighborhoods).

relatively more affluent people move into less affluent neighborhoods, housing costs increase, which in turn, causes relatively less affluent people to be involuntarily displaced from the neighborhood.²⁵⁵

In practice, it is unclear, however, if gentrification in fact causes significant involuntary displacement of existing residents if any.²⁵⁶ Most careful empirical analyses have failed to detect a rise in involuntary displacement within gentrifying neighborhoods; thus, it seems displacement plays a minor role if any as a force of change in gentrifying communities.²⁵⁷ For example, an influential study in New York City showed that the gentrification of the financial district produced no net population outflow.²⁵⁸ The authors attributed the lack of displacement to the fact that gentrification did not have a significant impact on the overall cost of living.²⁵⁹ Several empirical studies have suggested that low-income families in gentrifying neighborhoods are actually less likely to be displaced than in non-gentrifying neighborhoods.²⁶⁰ Although there exists some empirical evidence suggesting that the process of gentrification does lead to a modest increase in real housing prices in some cases, other social benefits from gentrification offset the moderate increase in housing

255. See Levy et al., *supra* note 254, at 238.

256. See Lin, *supra* note 253, at 15 n.2.

257. See *id.* (listing articles by Lance Freeman and Frank Braconi, Terra McKinnish and coauthors, and Lei Din and coauthors which discuss such careful empirical analyses).

258. See Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39, 41–42 (2004).

259. See *id.* at 50–51; see also William Easterly et al., *A Long History of a Short Block: Four Centuries of Development Surprises on a Single Stretch of a New York City Street 1* (Dev. Rsch. Inst., Working Paper No. 97, 2016) (illustrating how difficult it is for overly prescriptive planners to anticipate changes in comparative advantage and how such planning could stifle creative destruction).

260. See, e.g., Freeman & Braconi, *supra* note 258, at 48, 51; see also Terra McKinnish et al., *Who Gentrifies Low-income Neighborhoods?*, 67 J. URB. ECON. 180, 191–92 (2010) (finding that the gentrification of black neighborhoods attracts middle-class black households to move there). But see Kacie Dragan et al., *Does Gentrification Displace Poor Children? New Evidence from New York City Medicaid Data 4* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25809, 2019) (finding that minorities from gentrified neighborhoods are no more likely to move away than minorities in nongentrified neighborhoods). See generally LANCE FREEMAN, *THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP* (2006) (presenting gentrification from the perspective of residents in a gentrified neighborhood); Tim Butler, *For Gentrification?*, 39 ENV'T & PLAN. 162 (2007) (questioning the role gentrification plays on the evolution of cities).

costs, reducing the extent to which existing residents feel compelled to relocate.²⁶¹

2. Socially-positive Gentrification

Absent involuntary displacement of existing residents, the term “gentrification” is perhaps better described as a process of neighborhood revitalization or urban renewal in which the influx of relatively more affluent gentrifiers helps reduce concentrated (often urban) poverty.²⁶² For instance, gentrification has often resulted in the restoration of old and dilapidated housing and a general improvement in the overall quality of life resulting from increased tax revenue that is used to improve police, fire, public health, and educational services, among others.²⁶³ Recent studies have found that public housing residents in gentrifying neighborhoods are exposed to less violent crime, are more often employed, and have higher incomes and greater educational attainment than their counterparts in low-income neighborhoods.²⁶⁴ Moreover, from the perspective of residential integration, the process of gentrification

261. See, e.g., Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 URB. AFFS. REV. 463, 483 (2005); Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, BROOKINGS-WHARTON PAPERS URB. AFFS., 2002, at 133, 135; see also Janelle Vandergrift, *Gentrification and Displacement* 6 (Spring 2006) (available at <http://www.calvin.edu/~jks4/city/litrevs/gentrification.pdf>) (reiterating the findings of Freeman in his studies on gentrification); John Buntin, *The Myth of Gentrification: It's Extremely Rare and Not as Bad for the Poor as You Think*, SLATE (Jan. 14, 2015, 11:48 PM), <https://slate.com/news-and-politics/2015/01/the-gentrification-myth-its-rare-and-not-as-bad-for-the-poor-as-people-think.html> (“[G]entrifying neighborhoods appear to experience less displacement than nongentrifying neighborhoods.”); Richard Florida, *The Complicated Link Between Gentrification and Displacement*, BLOOMBERG: CITYLAB (Sept. 8, 2015 10:42 AM), <https://www.bloomberg.com/news/articles/2015-09-08/the-complex-relationship-between-gentrification-and-displacement> (reiterating the findings of the 2007 study by Braconi on gentrification). But see, e.g., Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23, 23, 51 (2006) (finding that displacement is a limited yet crucial indicator of deepening class polarization of urban housing markets).

262. See Freeman, *supra* note 261, at 463.

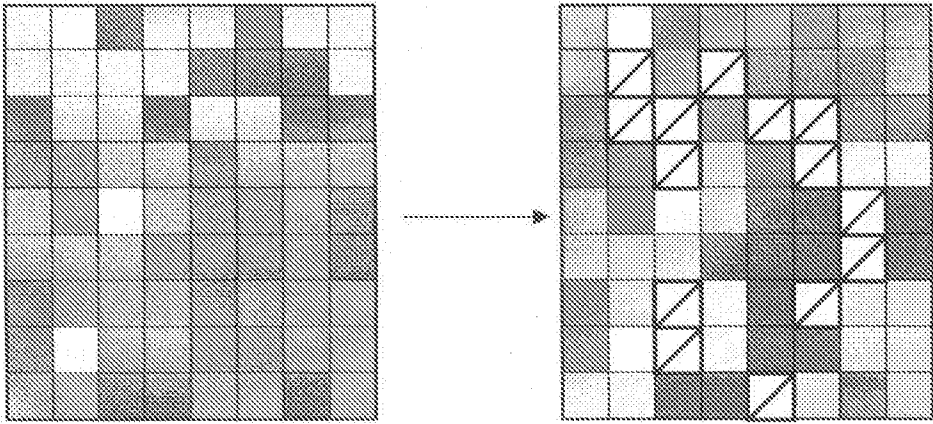
263. See Newman & Wyly, *supra* note 261, at 51.

264. See Samuel Dastrup & Ingrid Gould Ellen, *Linking Residents to Opportunity: Gentrification and Public Housing*, 18 CITYSCAPE, no. 3, 2016, at 87, 87; see also Ingrid Gould Ellen & Katherine M. O'Regan, *How Low Income Neighborhoods Change: Entry, Exit, and Enhancement*, 41 REG'L SCI. & URB. ECON. 89, 90, 92 n.13, 93, 96 (2011) (finding increased satisfaction among original renters who remained in a gentrifying neighborhood).

tends to increase social mixing by race or other demographic characteristics and thus indirectly helps realize the goals of residential integration and urban restructuring embodied in state and federal housing discrimination laws.²⁶⁵

This type of socially-positive gentrification, characterized by an absence of involuntary displacement, is depicted in Figure 5.

Figure 5. Socially-positive Gentrification.



The cells with bold borders and a bold diagonal line represent the influx of more affluent outsiders into previously undeveloped or unoccupied residential space. Although the process of gentrification depicted in Figure 5 does not cause involuntary displacement of existing residents, the influx of members of a different group does reduce location-based community (or spatial clustering).²⁶⁶

265. See, e.g., Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in America*, 17 CORNELL J.L. & PUB. POLY 1, 6 (2007); Matthew Jorzyk, *Gentrification's Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. & POLY REV. 413, 427 (2009); see also Loretta Lees, *Gentrification and Social Mixing: Towards an Inclusive Urban Renaissance?*, 45 URB. STUD. 2449, 2449, 2463 (2008) (arguing that new policies of social mixing require critical attention with regard to their ability to produce an inclusive urban renaissance). But see Mark Davidson, *Love Thy Neighbour? Social Mixing in London's Gentrification Frontiers*, 42 ENV'T & PLAN. 524, 524, 541 (2010) (finding little evidence of substantial interactions between gentrifying and incumbent communities in three neighborhoods undergoing new-build gentrification in London, England).

266. Note that less spatial clustering implies greater residential integration defined in terms of interaction or exposure.

To the extent that spatial clustering is socially beneficial, it is this increase in residential integration that (somewhat paradoxically) arguably represents the principal social cost of gentrification: The process of gentrification reduces the capacity of members of a minority group to voluntarily segregate and deprives the minority group of the social benefits of location-based community highlighted in Part IV.B. Of course, many are understandably hesitant, however, to characterize increased residential integration of longstanding minority neighborhoods as a social cost because historically so much spatial clustering, especially by race or ethnicity, has been involuntary and the direct result of intentional systematic housing discrimination as highlighted in Part III.²⁶⁷ Much of the spatial clustering by race or ethnicity that exists in many cities across the United States is not the outcome of free and voluntary choice but rather, is the direct consequence of intentional efforts by a white majority to separate and isolate a vulnerable minority population from the rest of mainstream society.²⁶⁸ The residents of these involuntarily segregated communities have endured widespread unrelenting poverty, often living in dilapidated and deteriorating public housing, and they have suffered from a significant lack of public investment in schools, policing, and fire protection.²⁶⁹ For this reason, there is seemingly no good reason to lament the integration (or positive gentrification) of a community that has been otherwise looked down upon in the past and whose geographic segregation was purposeful, systematic, and implemented with malicious discriminatory intent by a brutal and coercive majority.

And yet, gentrification often does provoke strong negative reactions even if the influx of gentrifiers does not result in the involuntary displacement of existing residents.²⁷⁰ This Article suggests that resistance to gentrification can be characterized in large part as a reaction to losing the social benefits of living in a location-based community, particularly where this spatial clustering is voluntary and not undertaken as a defensive response to a hostile majority. Part IV considered the important social benefits of voluntary residential segregation, including knowledge spillovers

267. See Part III.

268. See Part III.

269. See *supra* text accompanying note 263.

270. See Buntin, *supra* note 261.

and the facilitation of social assortative mating.²⁷¹ The gradual process of gentrification, however, can imperil the social cohesion of a location-based community and represent an existential threat to the social or cultural history of an entire community even without the involuntary displacement of existing residents. For example, residents in Harlem, a neighborhood in the northern section of Manhattan that has long served as an important historic capital of black culture, while recognizing that gentrification has led to improved city services and lower local crime rates, also justly fear that gentrification may be helping to permanently erase a long and rich history of black community and culture.²⁷² To wit, the Renaissance Theatre, a historically important structure in which black music and art had famously flourished for many years, has recently been demolished and replaced with new apartment buildings.²⁷³ Rightfully, there is a strong feeling among many that this distinct minority neighborhood, this well-known capital of black culture and social identity, must be aggressively preserved—or be forever lost in the unrelenting surge of gentrification.²⁷⁴

If the principal social cost of gentrification is not the involuntary displacement of existing residents but the loss of the social benefits of spatial clustering, then the best argument against gentrification is fundamentally an argument about restricting freedom of choice in housing and more specifically, about infringing upon the right of minority groups to voluntarily choose to reside in relatively homogenous location-based communities. Interestingly, this argument is more likely to be emphasized or made explicit with respect to other self-segregated communities, such as gay villages, where residential segregation historically has more often obtained as the result of free and voluntary choice. As gay villages have been increasingly embraced by mainstream culture, many have openly worried that the continuing gentrification of these neighborhoods²⁷⁵ is destined to render these location-based communities “a thing of

271. See Part IV.B.1.

272. See Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES (May 29, 2016), <https://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html>; see also Richard Schaffer & Neil Smith, *The Gentrification of Harlem?*, 76 ANNALS ASS'N AM. GEOGRAPHERS 347, 347 (1986).

273. See Adams, *supra* note 272.

274. See *id.*

275. For example, a case study of the Atlanta metropolitan area found that rising housing values has dispersed the LGBTQ population. Petra L. Doan & Harrison Higgins, *The Demise of Queer Space? Resurgent Gentrification and the Assimilation of LGBT Neighborhoods*, 31 J. PLAN. EDUC. & RSCH., Mar. 2011, at 6, 6.

the past.”²⁷⁶ In response to concerns about the “de-gayification” of historically gay villages and the loss of urban neighborhoods that have served as important expressions of sexual and cultural identity, several cities have undertaken proactive measures to maintain and preserve the unique identity and culture of its gay villages and the people and institutions that depend upon them.²⁷⁷ For example, the City of London has provided financial support to LGBTQ venues at risk of closing because of increasing rents.²⁷⁸ Likewise, in Montreal, the city is considering construction of a comprehensive community center designed to cater to the LGBTQ community.²⁷⁹ Most municipalities share the belief that there is something special about these minority enclaves that must be preserved. Underpinning this common desire to resist the gentrification of gay villages is arguably the shared belief that this type of residential segregation benefits not just the municipality, but more importantly, the minority community itself.²⁸⁰ At its core, the objection to gentrification of a location-based community, no matter the specific minority group impacted, is an objection grounded in the notion that people should have the freedom to choose where to live whether that be together as part of a diverse, interconnected community or separately as part of distinct, segregated, sometimes hostile tribes.

276. Feargus O’Sullivan, *The “Gaytrification” Effect: Why Gay Neighborhoods Are Being Priced Out*, GUARDIAN (Jan. 13, 2016, 2:30 PM), <https://www.theguardian.com/cities/2016/jan/13/end-of-gaytrification-cities-lgbt-communities-gentrification-gay-villages>; see, e.g., Amin Ghaziani, *Post-gay Collective Identity Construction*, 58 SOC. PROBS. 99, 106 (2011); Amy L. Spring, *Declining Segregation of Same-sex Partners: Evidence from Census 2000 and 2010*, 32 POPULATION RSCH. & POLY REV. 687, 687 (2013); see also Gene Balk, *Is Seattle’s ‘Gayborhood’ Vanishing?*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/data/map-is-seattles-gayborhood-vanishing/> (last updated July 31, 2014, 12:13 PM) (arguing that the 2012 Census Bureau data shows gay couples are moving out of Seattle’s gay neighborhood); Patricia Leigh Brown, *Gay Enclaves Face Prospect of Being Passé*, N.Y. TIMES (Oct. 30, 2007), <https://www.nytimes.com/2007/10/30/us/30gay.html>. See generally GHAZIANI, *supra* note 100.

277. See Gretel Kahn, *Is Montreal’s Gay Village Becoming Less Gay?*, CBC NEWS, <https://www.cbc.ca/news/canada/montreal/gentrification-montreal-gay-village-1.5239036> (last updated Aug. 11, 2019).

278. See Amin Ghaziani, *Culture and the Nighttime Economy: A Conversation with London’s Night Czar and Culture-at-Risk Officer*, METROPOLITICS (Nov. 12, 2019), <https://metropolitix.org/Culture-and-the-Nighttime-Economy-A-Conversation-with-London-s-Night-Czar-and.html>.

279. See Kahn, *supra* note 277.

280. See *id.*

V. CONCLUSION

This Article has argued that not all forms of residential segregation should be viewed alike. Certain patterns of residential segregation can be distinguished along two important dimensions: (1) voluntariness; and (2) net social impact. Notably, an outcome-based integration mandate is consistent with only one of the four categories of residential segregation implied by this typography: socially-negative involuntary segregation. Voluntary residential segregation is largely incompatible with outcome-based policies designed to promote residential integration. This Article claims that the existence of such voluntary spatial clustering implies that the government must adopt an *ex ante* choice-based approach to residential integration that seeks to protect and enable freedom of choice in housing rather than an *ex post* outcome-based approach that seeks to implement and maintain specific patterns of residential segregation deemed socially optimal by well-meaning policy elites. The central thesis of this Article is that the HUD mandate to AFFH must be interpreted as a responsibility to promote fair housing choice, to protect and enable freedom of choice, to enlarge the set of affordable housing options to include as many desired alternatives as possible, and not as an outcome-based mandate to site affordable housing in a limited number of areas that best implements certain patterns of residential integration deemed socially optimal *ex post* by well-meaning policy elites. The duty to AFFH must be both a duty to understand in which local communities those in need of affordable housing truly want to live as well as an obligation to expand or modify the set of affordable housing choices to encompass as many of these desired locations as is fiscally feasible.