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Racial Justice at Home: The Case for Opportunity-Housing Vouchers

Sara Aronchick Solow*

INTRODUCTION

On July 14, 2009, Secretary of Housing and Urban Development Shaun Donovan delivered a speech in which he laid out for the first time "the Obama

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Administration’s vision for neighborhood transformation for the 21st century.”

The centerpiece of Secretary Donovan’s remarks, and of the new Administration’s approach to urban poverty, is the Choice Neighborhoods initiative, a $250 million grant program to stimulate the revitalization of poor, inner-city areas. Under Choice Neighborhoods, the Department of Housing and Urban Development (HUD) will extend grants to public, private, and nonprofit organizations to provide public housing and other community services (e.g., after-school programs, childcare, and job counseling) to residents of urban communities. The philosophy behind Choice Neighborhoods, in the words of Secretary Donovan, is that not only is housing in ghetto areas substandard, “the communities themselves are substandard.”

According to Secretary Donovan, the Obama Administration’s focus on neighborhoods as the key to assisting ghetto communities differentiates its approach from that of the Clinton Administration. Under President Clinton, HUD sought to end urban poverty primarily through the HOPE VI program, a policy centered on revamping public housing. Choice Neighborhoods, claims Secretary Donovan, will reach more broadly than HOPE VI:

[P]ublic housing transformation is still our priority at HUD . . . .

But a Hope VI development that is surrounded by disinvestment, by failing schools or by other distressed housing has virtually no chance of truly succeeding.

That’s what Choice Neighborhoods is all about. It would expand on the legacy of HOPE VI by expanding the range of activities eligible for funding and capitalize on the full range of stakeholders we know are needed and want to be involved—from local governments and non-profits to private firms and public housing agencies.

I believe Choice Neighborhoods will do for our communities what HOPE VI did for public housing—as far as I’m concerned, it must.

Secretary Donovan and President Obama’s approach to improving the welfare of ghetto communities is founded on two understandings that this Note strongly supports: first, that concentrated poverty—particularly racially concentrated poverty—is unacceptable and demands an affirmative response from the federal government; and second, that individuals living in ghettos deserve both an adequate physical place to live and the ability to live in a community of opportunity. The commitment to proactive, race-conscious policymaking in housing and the conception of residential rights as a guarantee

2. Id.
3. Id.
of high-quality neighborhoods are both essential for a government committed to justice.

This Note will argue, however, that the Obama Administration should promote its vision of urban justice through a massive reform to the Section 8 rental-assistance program, not through Choice Neighborhoods alone. The same philosophies that motivate Choice Neighborhoods also compel a new national voucher program, the explicit aim of which is to help minority families move from ghettos to communities of opportunity. This new program might feature what this Note refers to as “opportunity-housing vouchers.” Like Choice Neighborhoods, the new voucher program would frame residential rights in terms of living in high-quality areas where jobs, good schools, and safe streets abound. Unlike Choice Neighborhoods, however, the voucher program’s specific aim would be to end the pattern of racial ghettoization, not to transform American ghettos into better residential areas.

This Note makes the case for an opportunity-housing vouchers program in two steps. First, it argues that from a perspective of justice, housing law in the United States should be founded upon a new normative theory squarely committed to antighettoization. The moral frameworks that currently drive our housing laws posit antidiscrimination, remediation, and anti-disparate impact as the fulfillment of racial fairness with respect to housing rights. These conceptions of justice do not go far enough. Under an antighettoization theory, alternatively, the eradication of racially concentrated ghettos in itself would be the prioritized central objective. Opportunity vouchers are desirable because they realize that objective.

Second, this Note argues for opportunity-housing vouchers not only from a justice standpoint but also from a pragmatic one; opportunity-housing vouchers make good public policy. As with the Section 8 rental assistance program, opportunity-housing vouchers would provide low-income families with subsidies to rent otherwise unaffordable housing units. Unlike Section 8 vouchers, however, opportunity-housing vouchers would have two unique features. They only would allow families to rent apartments in what are identified as “communities of opportunity,” and they would be allocated by HUD in a race-conscious fashion. Opportunity-housing vouchers make good policy sense because they would promote deconcentration directly, without the federal government’s bearing the herculean task of renovating the country’s poorest neighborhoods. This Note draws on several voucher programs that cities, as well as HUD, have implemented to show that vouchers can be an effective and relatively cost-efficient means of dismantling racial ghettos. This Note also explains how the voucher program it proposes differs from the largely unsuccessful policy experiment implemented by Congress in the 1990s, the Moving to Opportunity program.

Although the Supreme Court’s contemporary Equal Protection Clause jurisprudence casts suspicion on government activities that differentiate on the

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4. For an explanation of the mechanics of Section 8, see infra text accompanying notes 81-83.
basis of race, the Court could nonetheless sanction opportunity-housing vouchers in one of two ways. First, the Court could subject opportunity-housing vouchers to strict scrutiny as it does for most race-conscious government policies, but uphold the program because it further a compelling societal interest and is narrowly tailored. Here, the Court would place antighettoization policy on par with diversity promotion in universities and with remedial plans to mitigate historical discrimination, the two other activities the Court has sustained under strict scrutiny. Second, the Court could exempt opportunity-housing vouchers from strict scrutiny altogether, drawing on Justice Kennedy's concurrence in Parents Involved in Community Schools v. Seattle School District No. 1, which now appears to command a majority of the Court's support. Given that opportunity-housing vouchers take cognizance of race in allocating benefits overall, but not in selecting beneficiaries, the program follows Justice Kennedy's model of a race-conscious policy that should be immune from strict scrutiny.

The remainder of this Note is structured as follows. Part I explains why antighettoization, the normative framework that compels the proposed opportunity-housing vouchers, is the ideal theory of justice for housing law. It begins in Section I.A by exploring the normative frameworks that currently guide housing law in the United States: antidiscrimination, remediation, and anti-disparate impact. Section I.B shows that none of these three normative frameworks is sufficient. In Section I.C, this Note advocates for antighettoization as the preferable theory of justice for housing law. It defends antighettoization against two important critiques: one, that it is logically indefensible to have a specific theory of racial justice for housing; and another, that antighettoization does not go far enough in guaranteeing liberty for ghetto residents. Instead, this Note argues that it is logical to have a specific theory of justice for housing and that maximizing the residential choices of ghetto residents does not carry the same moral weight as eliminating racial ghettoization.

Part II demonstrates than an opportunity-housing vouchers program is not only normatively appealing but also is an effective public policy. Section II.A outlines the design of a new opportunity-housing vouchers program. Opportunity-housing vouchers would resemble Section 8 vouchers but would carry geographic restrictions and would be allocated in a race-conscious manner. Section II.A discusses how, compared to alternative strategies of realizing antighettoization, such as initiatives to build enterprise zones in

5. See infra notes 162-163 and accompanying text.
7. This Note is concerned with theories of racial justice, i.e., what constitutes fair treatment for different racial groups, rather than with theories of economic or political justice. Thus, when the terms “justice” or “theory of justice” are used without the modifier “racial,” the reader should still assume they are references to racial justice.
downtown areas, a voucher program carries more promise and less expense. In Section II.B, this Note explains why an opportunity-housing voucher holds promise even though several deconcentration programs already piloted, such as the congressionally authorized Moving to Opportunity initiative, have enjoyed mixed results. Here, the Note draws significantly from Thompson v. HUD, a housing lawsuit pending in Maryland federal district court. The plaintiffs in Thompson have proposed an innovative deconcentration remedy that includes mobility counseling, a regional administration of vouchers, and an overhaul of the relationship between HUD and local housing authorities. These program features carry enormous potential for overcoming obstacles that mobility programs have encountered in the past. Section II.B presents original ideas for structuring a deconcentration program to facilitate socioeconomic advancement for minority households that move out of the ghetto. The conclusion from Part II is that an opportunity-housing vouchers program can be designed effectively. The Obama Administration has a sufficient collection of models from which to draw. Whether or not it continues with Choice Neighborhoods, the Administration should use its political momentum to implement an opportunity-housing vouchers component within Section 8.

I. A New Theory of Justice for Housing Law: Antighettoization

The normative frameworks that currently shape federal housing law in the United States do not go far enough in guaranteeing racial justice. While these frameworks do call for various forms of equal treatment across racial groups, none demands an end to racial ghettoization itself, and none ensures the promise of housing in communities of opportunity for racial minorities. This Part will explain why antighettoization is the preferable theory of justice for U.S. housing law and will defend antighettoization against potential critiques.

A. Alternative Theories of Justice Embodied in Contemporary U.S. Housing Law

The federal laws concerning housing rights today are animated by three theories of racial justice: antidiscrimination, remediation, and anti-disparate impact. Under each theory, fair treatment across racial groups carries a different meaning. Unquestionably, antidiscrimination, remediation, and anti-disparate impact are concepts that resurface throughout American law, motivating statutes regarding employment, voting, schooling, and other social spheres. In the context of housing law, each theory drives a key statute or body of case law on housing rights, as this Section reviews.
1. Antidiscrimination: The Fair Housing Act

The first theory of justice central to federal housing law is antidiscrimination. Antidiscrimination is expressed in the core provisions of the Fair Housing Act (FHA), which prohibit marketplace actors from expressing racial preferences in the sale, rental, and advertising of homes.9 In 1988, Congress created a private right of action to sue under the FHA so that a plaintiff need not exhaust administrative remedies.10 Any person, regardless of race, has standing,11 as long as the plaintiff can show that the defendant acted "on the basis of race" in her housing market transactions.

Section 3604 of the Fair Housing Act—the Act’s central provision—seeks to promote racial justice in the housing market through the "private attorneys general" model. Aggrieved individuals can challenge biased practices in court. This provision does not prescribe, however, that federal or local actors undertake any affirmative institutional changes. As the Supreme Court recognized in Trafficante v. Metropolitan Life Insurance Co.:

[C]omplaints by private persons are the primary method of obtaining compliance with the Act.

... .

[T]he main generating force must be private suits in which ... the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."12

Many scholars have criticized the defensive posture that the FHA takes towards expanding racial justice in the housing market.13

9. 42 U.S.C. § 3604 (2006) ("[I]t shall be unlawful – (a) To refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin. (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin . . . ").


12. Id. at 209-11 (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)).

13. See, e.g., John a. powell, Reflections on the Past, Looking to the Future: The Fair Housing Act at 40, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 145, 146 (2009) ("The antidiscrimination orientation of the Fair Housing Act may itself be an impediment to achieving the goal of an integrated society. . . . The enforcement mechanisms of the Act . . . are largely individualistic, antidiscrimination tort approaches. These provisions may increase the freedom of choice for homebuyers but have not necessarily helped produce integrated neighborhoods or addressed segregated living patterns.").
Despite its limitations, the FHA has helped limit a wide variety of discriminatory behavior in the housing market over the past forty years. Plaintiffs have challenged successfully “racial steering” by landlords and real estate agents,14 mortgage and reverse red-lining by lenders,15 insurance redlining,16 and other exclusionary tactics such as selective gating of communities.17

2. Remediation: The Equal Protection Clause

A second theory of racial justice expressed prominently in American housing law is the need to remedy past governmental discrimination against racial minorities. This theory of justice is a close cousin of antidiscrimination theory. Remediation “makes whole” victims of historical mistreatment and thereby lays the foundation for a society that does not account for race in official decision-making. Both the Supreme Court and the lower federal courts, applying the Equal Protection Clause to practices in the housing market, have construed the Clause to demand remediation.

The Supreme Court first developed the remediation framework for racial justice not in housing cases but in school desegregation cases. In *Milliken v. Bradley*,18 the Court held that the Constitution required remediation for racial groups to correct identifiable episodes of state discrimination. The purpose of remediation is to “restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”19 The Court imported the remedial theory of justice into housing law in *Hills v. Gautreaux*.20 In *Gautreaux*, the Court upheld a district court’s race-conscious injunctive order remedying extensive discrimination by HUD. The Court held that, just as the Equal Protection Clause obligates federal authorities to undo de jure segregation in public schools, so too does it obligate authorities to remedy their discriminatory practices in public housing.21

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19. Id. at 746.
21. Id. at 297. While there are sections of the initial *Gautreaux* opinion that appear to embrace a more progressive, anti-disparate impact theory of racial justice, id. at 301-02, by the 1990s, the Supreme Court had restated its holding in *Gautreaux* as advancing the remediation theory. See Missouri v. Jenkins, 515 U.S. 70, 97-98 (1995).
Since Gautreaux, federal courts applying the Equal Protection Clause in housing discrimination lawsuits similarly have invoked the justice-as-compensation rationale. When plaintiffs are able to show that housing authorities have discriminated on the basis of race, either in recent years or in the more distant past, courts will demand that the government provide relief to plaintiffs for the harms they have suffered.22 About fifteen federal cases decided since 1974 have involved a judicial finding of liability by government actors for historical discrimination in public housing and have resulted in a Gautreaux-style remedy.23

3. Anti-Disparate Impact: Appellate Court Jurisprudence on the Fair Housing Act

The third theory of justice advanced by federal housing law is an anti-disparate impact theory. Under this normative framework, racial fairness demands not only neutral or even compensatory treatment by the government towards racial groups, it also requires that the government adjust its activities in the housing market to avoid an unnecessarily large negative impact on minority groups. Appellate and district courts have created an anti-disparate impact requirement under two separate sections of the FHA: the Act’s antidiscrimination provision, set forth at §3604,24 and the Act’s “affirmative” provision, set forth at §3608(e).25

First, with regards to §3604, the Seventh Circuit paved the way for the evolution in the case law in Metropolitan Housing Development Corp. v. Village of Arlington Heights ("Arlington Heights II").26 The court declined "to take a narrow view of the phrase 'because of race' contained in section 3604(a)" and held that §3604 outlaws disparate impact in housing just as Title VII does in employment.27 Since Arlington Heights II, nearly every federal court has reached

23. For a compilation of all housing lawsuits against HUD that were decided under the Equal Protection Clause and that resulted in a deconcentration remedy, see Florence Wagman Roisman, Long Overdue: Desegregation Litigation and Next Steps To End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs, CITYSCAPE, 1999, at 171, app. at 194-95, available at http://www.huduser.org/Periodicals/CITYSCPE/VOL4NUM3/roisman.pdf.
25. Id. §3608(e) (2006) (instructing the Secretary of Housing and Urban Development “affirmatively to further” the goal of fair housing).
26. 558 F.2d 1283 (7th Cir. 1977) [hereinafter Arlington Heights II].
27. Id. at 1289.
a similar holding regarding § 3604. Today, if a plaintiff suing under § 3604 makes a prima facie showing that a "decision . . . 'makes housing options significantly more restrictive for members of a protected group than for persons outside that group,'"\(^{29}\) the defendant must prove both that his decision furthered a legitimate interest and that no less discriminatory alternative existed.\(^{30}\)

Second, several federal courts also have held that an anti-disparate impact requirement attaches under § 3608(e)(5). Section 3608(e)(5) requires that HUD "administer the [housing] programs . . . in a manner affirmatively to further the policies of this subchapter."\(^{31}\) In Shannon v. HUD, the Third Circuit held that this provision obligates HUD to apply an anti-disparate impact assessment to its comprehensive housing agenda in a given city.\(^{32}\) Following Shannon, then-Judge Breyer of the First Circuit held § 3608(e)(5) to require that HUD reallocate its entire set of housing grants in Boston to minimize racial clustering in poor areas,\(^{33}\) and another federal court used § 3608 to enjoin suburban housing authorities from applying residency preferences to Section 8 waiting lists.\(^{34}\) In Thompson v. HUD, which will be explored at length below, the district court went even one step further. The court agreed with Judge Breyer that § 3608 requires HUD to "assess negatively those aspects of a proposed course of

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28. Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 58 (D.D.C. 2002) ("Every Circuit Court except the District of Columbia Circuit has held that disparate impact claims are cognizable under the FHA.").


30. See, e.g., Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977). Although the precise analysis differs from case to case, most federal courts deciding § 3604 cases now apply the tests developed by the Second Circuit in NAACP v. Town of Huntington to decide if there was disparate impact and to decide whether the housing policy in question furthered "a legitimate, bona fide governmental interest." NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

31. 42 U.S.C. § 3608(e)(5) (2006). "The policies of this subchapter" include the mandate "to provide, within constitutional limits, for fair housing throughout the United States." Id. § 3601.


33. See NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (holding that § 3608(e)(5) required HUD to "consider [the] effect of [every HUD grant] on the racial and socio-economic composition of the surrounding area," to "assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply" (alterations in original) (quoting Anderson v. City of Alpharetta, 737 F.2d 1330, 1537 (11th Cir. 1984))).

action that would further [entrench segregated housing]; but held that the anti-disparate impact mandate reaches “beyond the city borders.”

Both § 3604 and § 3608 cases apply a conception of racial justice under which fairness is achieved when actors in the housing market minimize the unnecessary side effects of their actions on racial minorities. Justice, in other words, means preventing unnecessary harms. The § 3608 cases go farther than the § 3604 cases because they require government actors not only to reduce the disparate impacts of one-off policies but also to undertake more comprehensive evaluations of their agendas and to choose the policies that (all else equal) are most beneficial for minority groups.

B. The Shortcomings of Housing Law’s Current Normative Frameworks

The normative frameworks that underlie federal housing laws in the United States—antidiscrimination, remediation, and mitigation of disparate impact—are all insufficient to ensure racial justice. In countless cities across America, neighborhoods are defined by entrenched poverty, underperforming schools, a dearth of jobs, and a disproportionate share of racial minorities. These neighborhoods, America’s racial ghettos, are an affront to liberal notions of fairness. Racial ghettos systematically deprive groups of opportunities to enjoy society’s resources, and they advance no other societal benefit. An adequate theory of justice must recognize racial ghettoization itself as a substantive injustice to be corrected, thereby accomplishing what antidiscrimination, remediation, and anti-disparate impact theories cannot alone.

1. The Persistence of Racial Ghettoization

Although housing conditions for African-American families have improved considerably since the 1960s, particularly for black middle-class families, there still is deep racial unfairness in the U.S. housing market. First, racial segregation remains an issue. Three-quarters of all metropolitan areas in 2000 were either “segregated” or “hypersegregated” according to analysts at the Brookings Institution. The average white suburban family lives

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36. Id. at 458.
37. Orlando Patterson, The Ordeal of Integration: Progress and Resentment in America’s “Racial” Crisis (1997) (documenting the growth of the black middle class since the 1960s and the improvement in resources and opportunities for black middle class households).
in a neighborhood that is 85% white and 15% minority. The average black suburban family lives in a neighborhood that is over 50% minority.  

Second, even more alarming than the prevalence of racial segregation is the strong correlation, especially in metropolitan areas, between neighborhood racial composition and neighborhood poverty level. In 2000, African-Americans were the strong majority, constituting 60% or more of the population, in nearly half of the country's "high poverty" areas, which numbered around 3000. In other words: The ghettos are, disproportionately, black. According to Paul Jargowsky, a poor black person in the United States is three times more likely than a poor white person to grow up in a neighborhood of "extreme" poverty. Even a middle-class black person today lives in a neighborhood with a poverty level up to 42% higher than that where his white counterpart lives. These statistics show that American neighborhoods not only are divided according to race but also according to racial class. The phenomenon of racial ghettoization is apparent and has worsened in recent years.


40. Id. at 23 (referring to neighborhoods with rates of poverty of 30% or more).

41. Alan Berube, Concentrated Poverty in America: An Overview, in The Fed. Reserve Sys. & The Brookings Inst., The Enduring Challenge of Concentrated Poverty in America: Case Studies from Communities Across the U.S. 7 (2008), available at http://www.brookings.edu/-/media/Files/rc/reports/2008/1024_concentrated_poverty/1024_concentrated_poverty.pdf (showing that there were 2500 "extreme poverty neighborhoods" in the year 2000, in which poverty rates were 40% or higher).


43. Robinson & Grant-Thomas, supra note 39, at 22.

44. Since 2000, metropolitan areas have seen an increase in rates of highly concentrated poverty, as have working-class suburbs. See Elizabeth Kneebone & Alan Berube, Brookings Inst., Reversal of Fortune: A New Look at Concentrated Poverty in the 2000s 10, 16 (2008). These trends mean that racially concentrated poverty has risen as well given that minority residents are the primary occupants of poor urban neighborhoods.
2. The Exceptional Immorality of Racial Ghettos

From the standpoint of liberal political theory, racial ghettoization is problematic first and foremost because it perpetuates racial subordination. Indeed, many social processes besides ghettoization also contribute to racial subordination: political elections that yield an underrepresentation of minorities in government; admissions processes that yield an underrepresentation of minorities in universities; and capitalist markets that produce an income distribution in which minorities are in the lowest percentiles. Why, if at all, is racial ghettoization different from these other forces? Does it demand a separate theory of justice?

This Note argues that in at least three ways, racial ghettos are uniquely problematic for the liberal state, and racial ghettoization therefore demands a specific theory of justice. These reasons are: (1) racial ghettos have a deeper link with racial caste than any other social process; (2) racial ghettos systematically deprive minorities of opportunities while promoting no other societal value; and (3) racial ghettos can be eliminated without the use of racial quotas.

Before unpacking the aforementioned reasons that racial ghettoization is exceptional, all of which trace back to the phenomenon of “racial caste,” it is first necessary to define the concept of “racial caste.” Racial caste refers to a societal arrangement in which hierarchies of fortune—political power, economic wealth, and social status—correlate with race. In any democracy, hierarchies of fortune raise concerns about whether there is a sufficient degree of political or economic equality. But when hierarchies also are correlated with race, this arrangement damages the rights of the individual and the character of the democratic polity in profound ways. From the standpoint of the individual, racial hierarchies breed stigma, corrupting a person’s sense of self-worth and forcing him to compete in a world that prejudices him as undeserving. Racial

45. When this Note refers to “liberal political theory” or the “liberal state,” it is referring primarily to the work of Ronald Dworkin and John Rawls. Dworkin’s political theory begins with the normative premise that all human beings must be regarded as free actors, responsible for their personal life choices. Accordingly, Dworkin contends, the goal of the liberal, democratic state should be to structure its laws and institutions to ensure that every individual is afforded that equal respect and concern. See Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality (2000); Ronald Dworkin, Taking Rights Seriously (1977). Rawls’s political theory is similarly built upon a normative commitment to basic liberties for all persons. For Rawls, the liberal democratic order will only be just if it provides every individual with an equal claim to an adequate scheme of rights and opportunities. See John Rawls, Political Liberalism (1993).

46. John A. Powell, Structural Racism: Building upon the Insights of John Calmore, 86 N.C. L. Rev. 791, 813 (2008) (“The ‘self’ is contextual and relational. For example, ‘white’ identity derives much of its substance through its negation of the racialized other. The racial meaning that is in part a product of our institutional arrangements plays a role in the construction of our selves...”).
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hierarchies also create nonrandom deprivations of opportunity given that one’s probability of being poor is a function of his race, which is unfair both for the unborn child and for the extant racial group whose incoming members are destined to be disadvantaged. From the perspective of the democratic polity, racial caste frustrates the possibility for collective association and citizenship. As Michael Walzer explains, basic inequalities between people due to talent, income, or prestige are natural and typically not fatal to the polity. When a social system is ordered, however, such that having an inborn trait such as race entails enjoying other advantages, this pattern erodes the mutual respect that is the necessary foundation of democratic citizenship.\(^4\)

Racial ghettos are by no means alone in contributing to the problematic phenomenon of racial caste. Numerous processes in the economic market, political market, and other societal spheres also produce racial hierarchies. For instance, as mentioned above, political elections that happen to produce an underrepresentation of minorities in government, or admissions processes that happen to produce an underrepresentation of minorities in universities, also foster a racial underclass. Even when these processes operate fairly and on the basis of merit, i.e., even when they are completely devoid of actors who discriminate, they still can perpetuate racial subordination by yielding underrepresentation for minority groups.

Nonetheless, this Note argues that racial ghettos can be distinguished from the other mechanisms that cause disparate impacts for minority groups. For three reasons, individually and especially in combination, racial ghettos are uniquely illegitimate in their fostering of racial caste.

First, racial ghettos bear a deeper, more intimate link with racial caste than any other societal process or institution. This is because a person’s neighborhood—besides perhaps one’s family and one’s genes—is the most important influence on his or her life opportunities. Neighborhoods determine the education that a person will receive at an early age,\(^48\) the jobs that will be available to that person as he grows older,\(^49\) and the social networks to which he will be exposed. Neighborhoods shape one’s identity and sense of place in the world: “The structures we inhabit not only distribute material benefits and burdens across society, but also distribute meaning, which in turn shapes . . . attitudes and influences the formation of . . . identities.”\(^50\) Thus, unlike other

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49. See generally John F. Kain, Housing Segregation, Negro Employment, and Metropolitan Decentralization, 82 Q.J. Econ. 175 (1968) (explaining how job availability varies by neighborhood).

50. powell, supra note 46, at 811.
determinants of socioeconomic status, neighborhoods affect nearly every societal mechanism that influences a person's opportunities.

There is convincing evidence that in the United States, racial ghettos are one of the primary causal determinants of the black underclass today. Beginning in elementary school, African-American children born in poor urban communities are deprived of educational resources and set on a course toward low academic achievement. Between 1990 and 2000, the average black child in the United States attended a school that was 65% poor, while the average white child attended a school that was 30% poor. In the employment market, the dearth of jobs in ghetto neighborhoods pushes up the long-term unemployment rate for African-Americans and encourages many to drop out of the job market altogether. In central cities today, nearly one in two African-American adults is not even in the labor force. Finally, the high incidence of crime in ghetto areas is another nail in the coffin of opportunity. Children who

51. See, e.g., Patrick Sharkey, Pew Charitable Trusts, Neighborhoods and the Black-White Mobility Gap 11 (2009) (finding that neighborhood poverty is a significant causal determinant of the "extremely high rates of downward mobility" of black children raised in poor neighborhoods); id. at 10-16, 20-21; David M. Cutler & Edward L. Glaeser, Are Ghettos Good or Bad?, 112 Q.J. Econ. 827, 828 (1997) ("[W]e find strong, consistent evidence that black outcomes are substantially worse (both in absolute terms and relative to whites) in racially segregated cities than they are in more integrated cities. As segregation increases, blacks have lower high school graduation rates, are more likely to be idle (neither in school nor working), earn less income, and are more likely to become single mothers.").


55. Algernon Austin, Econ. Policy Inst., Economic Gains of the 1990s Overturned for African-Americans from 2000-07, at 6 (2008), http://epi.3cdn.net/f205db387e418862d6_c5m6bhw0j.pdf (showing that in 2007, the black employment rate in central cities was only 56%).
are exposed to violence at young ages demonstrate high tendencies to engage in violent behavior themselves. These features of the racial ghetto combine to produce an identifiable and persistent black underclass in America's cities.

Eradicating ghettos would have an exponential effect on racial caste relative to fixing any singular process that disparately impacts minorities. The sheer strength of the causal relationship between racial ghettos and racial subordination makes the moral problem of the racial ghetto distinct.

The second reason why racial ghettoization raises exceptional problems for liberal society is that it facilitates subordination for minority groups while promoting absolutely no other societal benefit or set of rights. Compared to the other processes not driven by animus but contributing to racial subordination, racial ghettoization stands apart; those processes, at least arguably, further collective goods and individual liberties. For instance, fairly designed employment tests that happen to select disproportionately for white persons and thus disparately impact African-Americans nonetheless may further the societal benefit of economic productivity. These tests also promote the individual liberties of business owners, enabling them to choose the most qualified workers available. Political elections that end up yielding an underrepresentation of minorities in government similarly can be said to promote a broader societal good, that of democratic fairness, as well as the individual liberties of voters. Similar arguments can be made for university admissions processes, which both enrich society's aggregate human capital and advance the rights of individuals to be selected based on academic merit; stiff penalties for criminal offenses, which both protect the community and provide retributive justice to victims of crimes; and competitive allocations of government contracts, which both maximize collective productivity and reward entrepreneurial merit.

Racial ghettos, however, perpetuate racial castes while producing no other collective good and advancing no other individual rights. There is nothing beneficial for the collective polity, either from a utilitarian perspective or from a deontological perspective, that is achieved by having neighborhoods stratified according to racial class. On the contrary, racial ghettos drive down the overall economic activity within a city, decrease the employment rate, and increase aggregate crime levels. With respect to individual rights, there is also no

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57. See generally id.


59. Id. at 14-54 (documenting the low levels of economic activity and depressed employment rates associated with racial ghettos and the effect of ghettoization on cities); see also Ruth D. Peterson & Lauren J. Krivo, Segregated Spatial Locations,
inherent connection between racial ghettos and personal liberty. While many middle-class families, both white and black, choose not to live in the ghetto and thereby express their free will to avoid ghettos, these families still would be able to choose from a diverse array of residential options in a world with no ghettos at all, including the option of living in a racially concentrated middle-class neighborhood.60 In short, the existence of the racial ghetto does not expand freedom in any meaningful way. Some might argue that many African-Americans do choose to live in contemporary ghettos and that such a choice would be removed paternalistically if racial ghettos were eliminated.61 Though this claim might be descriptively accurate, the choice to live and raise one's children in a ghetto is not an informed preference that society should deem morally compelling.62

The third and final reason that racial ghettos pose unique normative problems for liberal society is that they can be fixed without invoking troublesome racial quotas. In many other social spheres where minorities are underrepresented, such as schools, jobs, and elected offices, a direct expansion of opportunities for minorities, or “affirmative action” measures, requires the use of soft or hard quotas. In turn, society must address some difficult questions. How many slots should be reserved for minorities in order to yield an adequate representation? What mechanisms can society use to allocate scarce benefits to minorities without creating a sense of racial inferiority? And how can society make sure that race does not become the exclusive determining factor in allocating resources, but that it plays a role? None of these questions has an easy


60. Many scholars have argued that blacks and whites should have the right to choose to live in nonintegrated arrangements for economic, individual-rights, and group-rights reasons. See Richard Epstein, Forbidden Grounds 68-69 (1992) (arguing that voluntary residential segregation is economically efficient); Brian Patrick Larkin, Note, The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration, 107 COLUM. L. REV. 1617, 1636 (2007) (arguing that African-Americans should have the right to live in all-black or mostly black neighborhoods to gain political empowerment as a group). Even assuming that these arguments have merit and that whites and blacks should be able to choose nonintegration, the elimination of racial ghettos would not in and of itself deprive anyone of the right to choose nonintegration. Whites and blacks could still choose to remain segregated in a world with no racial ghettos; only now, they would be choosing to sort themselves into separate high-opportunity neighborhoods.

61. See infra notes 75-78 and accompanying text.

62. This Note concedes that one individual freedom that the elimination of racial ghettos would eradicate is the choice of African-American households to live in a racially concentrated ghetto. Because ghettos are by definition neighborhoods with limited opportunities, the choice to subject oneself, one's family, and one's children to such conditions should not be deemed morally acceptable in a liberal society.
answer; courts and policymakers have debated for decades how quotas should be used to expand opportunities.\footnote{See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (invalidating a city’s policy to reserve 30% of the city’s construction contracts for minority-owned businesses, claiming that these set-asides were “rigid racial preferences”); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (barring overt racial quotas in college admissions but allowing race to be used as a so-called plus factor).}

Meanwhile, fixing the problem of racial ghettoization raises none of the typical issues surrounding affirmative action because residency in high-opportunity neighborhoods is not a scarce benefit that needs protection through quotas. Unlike enrollment in a university or employment at a firm where slots are inherently limited, living outside the ghetto is an opportunity that can be made available to all persons, at least over the course of time as sufficient government resources are made available. Schools and firms are closed universes, but high-opportunity neighborhoods are not. Society can facilitate the movement of ghetto residents into communities of opportunity without having to reserve any “spots” for minorities or exclude any nonminorities. Accordingly, the perpetuation of racial ghettos is even more unjustified than the continuation of most societal processes that facilitate subordination, because ghettos can be eradicated without invoking the messy apparatus of quotas.

3. Why Current Theories of Justice in Housing Law Fall Short

All three theories of justice that currently animate U.S. housing law—antidiscrimination, compensation, and anti-disparate impact—are normatively insufficient because all three fail to confront directly the exceptional injustice of the racial ghetto.

Antidiscrimination theory posits race-neutral treatment as the ultimate societal good but does not consider racially concentrated ghettos, if produced through fair, nondiscriminatory practices, to be inherently unjust. Housing claims that are brought under the text of the FHA, which applies the antidiscrimination framework, thus turn on the racial animus of the public or private actor but not on the existence of the racial ghetto.\footnote{See supra notes 9, 14-17 and accompanying text.}

Compensation theory posits race-neutral treatment alongside remediation as the ultimate societal good and so only considers racially concentrated ghettos as substantively unjust if they are the products of discriminatory government practices. Housing litigation brought under the Equal Protection Clause, which is driven by the compensation rationale, turns on whether specific evidence of racial discrimination by a government actor exists. It is no surprise that, over several decades, only a handful of the country’s racial ghettos—about fifteen—
have begun to undergo deconstruction through the vehicle of the Equal Protection Clause lawsuit.65

Anti-disparate impact theory posits the mitigation of harsh side effects of societal processes to be the ultimate good, but only when such mitigation can be achieved without overly compromising other societal values. Plaintiffs suing under an anti-disparate impact application of the FHA cannot allege the general unfairness of the racial ghetto as such but must target a particular societal practice that produces the ghetto.66 At times, such a distinct process or practice will not be identifiable.67 Moreover, anti-disparate impact theory is concerned with reducing disproportionate harms for racial groups but only up to a certain point. In anti-disparate impact lawsuits brought under the FHA, courts often defer to defendants, requiring them only to make a showing of "legitimate" goals furthered by their housing policy in order to prevail.68 Requiring only a "legitimate" interest to justify the continuation of housing policies that cause disparate impacts for minorities is simply not equal to a theory of justice that morally condemns the racial ghetto as such. Several practitioners contend that § 3608 of the FHA does require more than anti-disparate impact policies, because the purpose of the provision is to dismantle racial ghettos at whatever cost.69 This Notes endorses a broader of reading of § 3608,70 and it ultimately suggests that § 3608 be the statutory hook for the antighettoization policy it proposes.71 Nonetheless, because the prevailing approach in federal courts today is to treat § 3608 as an anti-disparate impact provision,72 it is first necessary to flesh out what a more robust theory of racial justice for housing law would entail.

65. See supra note 23 and accompanying text.
66. Seng & Caruso, supra note 10, at 240 ("Congress could further expand the burden-shifting devices used in disparate impact cases [under the FHA] to those cases where there is no policy or practice but where the housing has a disproportionate number of nonminority occupants and the housing is located in an area with a large minority concentration.").
67. E.g., Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996).
68. E.g., Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) (holding that there is no statutory violation if a "demonstrated disparate impact in housing [is] justified by a legitimate and substantial goal of the measure in question"); NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988).
70. The legislative history supports the beyond-anti-disparate-impact reading. See id. at 371-88.
71. See infra note 174 and accompany text.
72. See supra notes 32-36, 66-68.
C. Antighettoization as the Correct Normative Framework

A new theory of justice for housing would extend beyond those currently recognized in our housing statutes and jurisprudence and would posit the exceptional immorality of racial ghettoization as a substantive injustice deserving an immediate remedy. Call it “antighettoization” theory. Rather than neutral treatment, compensation of victims, or the tweaking of current practices to ensure that they are least harmful, this new theory of justice would conceptualize the elimination of the racial ghetto as an ultimate outcome demanded in housing markets.

A few questions and comments about this new theory of justice are in order.

First, why is it an improvement over outstanding theories? An antighettoization theory of justice is stronger than those that animate our housing law today because it posits the outcome of racial ghettoization, rather than the processes in the housing market that contribute to such an outcome, as the unacceptable moral wrong. Even in situations where private or public actors do not exhibit racial animus, where the government has not discriminated historically, and where defendants can show that every social process that perpetuates the ghetto has a “legitimate” justification, an antighettoization theory would condemn the existence of the racialized ghetto.

Second, what corrective actions would an antighettoization theory demand? In Part II, this Note presents in detail a national administrative program that could be implemented to carry antighettoization theory into effect. Suffice it to say here that the central response demanded by an antighettoization theory is a race-conscious policy, undertaken by the federal government, that provides minority residents of ghettos with access to housing in high-opportunity communities. The specific program suggested by this Note, involving “opportunity-housing vouchers,” would provide new subsidies through HUD’s Section 8 program to allow for apartment rentals in communities of opportunity. The opportunity-housing vouchers program surely is not the only conceivable policy that would encompass an antighettoization theory of justice, and this Note advocates for this policy for reasons beyond its normative foundation. But what any policy to implement antighettoization must do is provide residents of ghettos an assurance of living in a community of opportunity.

Third, why is it logical and normatively defensible to propose a theory of justice that is particular to the housing market? Why not extend the antighettoization framework proposed here to all forums that engender racial subordination? For instance, in the job market, where anti-disparate impact theory currently governs under Title VII, why not extend antighettoization theory and declare that the racial concentration of persons in minimum wage jobs is per se unjust? Why not demand an affirmative action policy in the job

73. See infra notes 75-78 and accompanying text.
market along the lines of the “opportunity-housing vouchers” program, which would help minorities become employed in higher-wage jobs? Or in the household-income spectrum, why not extend antighettoization theory to declare that the racial concentration of families in the lowest income brackets is per se unjust? And why not implement a race-based progressive income tax to reallocate income across groups?

With regard to these questions, this Note has shown that, because of the exceptional illegitimacy of the racial ghetto, it is both logical and defensible to design a theory of racial justice that is limited to the housing context. As explained above, racial ghettos not only perpetuate caste, they also raise unique normative concerns because they bear a deeply intimate link to racial subordination, promote no other societal benefit or set of rights, and can be eliminated without the use of racial quotas. Thus, while one surely could argue that other social practices merit stronger theories of justice, theories that go further than antidiscrimination, remediation, or disparate impact reduction, those arguments need not be addressed here in order to accept antighettoization theory as an appropriate, even if exclusive, normative framework for the housing market.

Finally, why is antighettoization the ideal theory of justice for the housing market rather than a theory that posits the expansion of residential choices for low-income minorities as the ultimate good? Under antighettoization theory, justice would be served either by a program that helped low-income minorities exit the ghetto or by a program that transformed the ghetto into a high-opportunity neighborhood and thereafter gave minorities more residential choice. This Note argues for the former approach as the best means of realizing antighettoization theory from a policy standpoint. But, we need to take a step back and consider whether a theory of justice should be satisfied with either type of program. In other words, is the normative injustice really the existence of racially concentrated ghettos or is it the inability of ghetto residents to choose their own fates, including the option of remaining in their current neighborhood but having access to greater opportunities?

Some have argued that a “choice-based” theory of justice should anchor housing law. Under the choice-based theory, justice is understood as demanding not just the right to live in any community of opportunity, but the right to live in the community of opportunity you choose, even if this means staying rooted in the ghetto and having the ghetto be transformed. Part of the rationale behind this theory is that minorities should not be forced to move to

74. See infra Part II.

75. See, e.g., Larkin, supra note 60; Michael R. Tein, Comment, The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination, 140 U. Pa. L. Rev. 1463, 1496 (1992) (arguing for “the right of people to remain indefinitely where they are” and that “forcing dispersal [of blacks] among the larger white community is itself discriminatory” (quoting ROBERT F. FORMAN, BLACK GHETTOS, WHITE GHETTOS, AND SLUMS 46 (1971))).
largely white neighborhoods in order to experience society's socioeconomic opportunities.\textsuperscript{76}

This Note advocates for antighettoization theory rather than a choice-based theory as the correct framework for housing law for two reasons. First, antighettoization promotes individual rights in a manner more consistent with how rights are protected in liberal democracies generally. Under an antighettoization framework, individual rights connote one's ability to live in a community of opportunity, thereby sharing in society's coveted resources. Throughout the liberal state—the job market, political market, and education system—individual rights similarly confer the ability to access societal resources.\textsuperscript{77} Under the choice-based theory of justice, meanwhile, individual rights are understood as conferring access to \textit{specific life outcomes willed by the individual}. Again, the choice-based framework posits that a person has the right not just to live in any community of opportunity, but also the right to live in the \textit{specific} community of opportunity that he or she wills (even if a revitalized ghetto does not yet exist). If applied throughout the liberal state, this conception of rights would be transformative and unworkable. For instance, the right to higher education would entail the individual right to design a new preferred university. Moreover, the fact that antighettoization theory expects individuals to sacrifice their ideal preferences is not fatal. The liberal state constantly expects individuals to make personal sacrifices of effort, of time, or of preferences to compete for society's opportunities. The requirement of sacrifice does not deplete justice; it is what a just provision of opportunities most commonly entails.\textsuperscript{78}

Second, antighettoization is the preferable normative framework for housing law because a choice-based theory runs the risk of endorsing racial enclaves. Under a choice-based theory, one central reason why minorities must enjoy the right to choose living in the ghetto is that all persons should be able—if they desire—to live in a neighborhood where they constitute the racial majority.\textsuperscript{79} In other words, a choice-based theory posits that living in a physical space where one's racial identity is reified around her is an individual right the

\textsuperscript{76} See, e.g., J. Phillip Thompson, \textit{Beyond Moralizing}, in \textit{A WAY OUT} 60, 66 (Joshua Cohen et al. eds., 2003) ("I hope that instead of telling poor blacks that they cannot afford to live with one another . . . some kind of democratic and empowering process can be envisioned in which African Americans might be able to utilize their churches, clubs, community organizations, and other social networks to promote their own vision of how they want to live . . . ."); Tein, \textit{supra} note 75.

\textsuperscript{77} Equal access to societal opportunities and rights is again the central focus of the work of Dworkin and Rawls. See \textit{supra} note 45.

\textsuperscript{78} Accord Owen Fiss, \textit{What Should Be Done for Those Who Have Been Left Behind}, in \textit{A WAY OUT}, \textit{supra} note 76, at 3, 34 (explaining that "[c]hoosing to move entails a sacrifice" but that sacrifice is a reasonable feature of a deconcentration policy).

\textsuperscript{79} See Thompson, \textit{supra} note 76.
government should support. The problem with this rationale is that it contradicts one of the orienting philosophies of liberal democracies; it endorses segregated living spaces rather than diverse, open ones. Though democratic governments do and should provide minority groups with support to cultivate their cultural resources, tying such support to geographical locations would create physical islands of exclusion.

In sum, antighettoization is a powerful improvement over the current frameworks animating our housing law. It conceives of the racial ghetto as the substantive injustice to be corrected, and it calls for affirmative-action style programs that would enable racial minorities now confined to the ghetto to move to communities of opportunity. Antighettoization theory works as a theory of justice specific to the housing market; given the exceptional immorality of the racial ghetto, it is logically defensible to promote antighettoization but also to argue that it should be limited to housing rather than extended to other societal forums that cause disparate impacts. And finally, antighettoization is a more attractive means of ensuring justice in the housing market than a choice-based theory. Antighettoization conceives of individual rights in a manner more appropriate for, and in harmony with, liberal democracies, and it avoids facilitating minority-group rights in a way that would encourage geographic segregation.

II. APPLYING THE THEORY: OPPORTUNITY-HOUSING VOUCHERS

To implement the antighettoization theory of justice for housing law that this Note proposes, the United States should reform Section 8 to include a new "opportunity-housing vouchers" program. In Section II.A, this Note explains what an opportunity-housing vouchers program would entail and why it is preferable, from a public policy perspective, to other programs that might advance antighettoization. Granted, past efforts to deconcentrate the ghetto through voucher-based programs have not always worked. The congressionally authorized Moving to Opportunity (MTO) program from the 1990s most significantly failed to produce lasting residential mobility or socioeconomic gains for most families that participated.80 In Section II.B, however, this Note demonstrates that an opportunity-housing vouchers program can be designed to avoid the pitfalls of previous housing mobility initiatives and to improve upon the MTO model. Drawing on the remedy requested by the plaintiffs in a recent housing lawsuit, this Note shows that deconcentration can be achieved at the administrative level and that it can be done well.

A. The Proposal: "Opportunity-Housing Vouchers" Within Section 8

The central policy proposal in this Note is that antighettoization theory be implemented through a new opportunity-housing vouchers program. The program would use the architecture of Section 8 to provide rental assistance on

80. See infra notes 113-114, 121-123 and accompanying text.
a national scale, but, unlike Section 8, it would explicitly promote racial
deconcentration as its objective.

To understand why opportunity vouchers are necessary for realizing the
antighettoization principle, it is first necessary to explain why Section 8 alone is
insufficient. Section 8 is the primary “household-based” rental assistance
program in the U.S. for low-income individuals. Government benefits attach
in the form of housing subsidies for families to use in the housing market,
rather than in the form of physical structures to be used for public housing.
Section 8 is funded by Congress and is operated by HUD in conjunction with
local public housing authorities (PHA). Under current law, a Section 8 recipient
can use her voucher for any rental unit in the private market nation-wide, as
long as the unit conforms to price and quality requirements established by
HUD. The portability of Section 8 vouchers is an enforceable right of the
recipient.

Although Section 8 vouchers are portable in theory, they fail to be so in
practice. The majority of Section 8 recipients end up using their vouchers not to
move to high-opportunity neighborhoods but to remain where they are
currently located, which is largely in ghettos or ghetto-like areas. The primary
reasons why Section 8 vouchers are not truly portable are well-documented:
low-income families lack information about housing opportunities in the
suburbs; suburban landlords harbor prejudices against tenants who accept
government assistance; and there is a shortage of housing units that meet
HUD’s fair-market-rent specifications in middle-class neighborhoods. Thus,
although one of the self-declared aims of the Section 8 program upon creation

81. U.S. Dep’t of Hous. & Urban Dev., Housing Choice Vouchers Fact Sheet,
http://www.hud.gov/offices/pih/programs/hcv/about/fact_sheet.cfm (last visited
July 1, 2010).
83. Philip D. Tegeler, Michael L. Hanley & Judith Liben, Transforming Section
8: Using Federal Housing Subsidies To Promote Individual Housing Choice and
84. Rodger Climaco et al., Portability Moves in the Housing Choice Voucher Program
www.huduser.org/periodicals/cityscape/vohonumi/vohonumic1.pdf (finding that “[o]f all
3.4 million households ever in the federal housing voucher program from 1998 to
2005,” a mere “8.9 percent used their voucher to exercise a portability move to
another jurisdiction” and that in 2005, only 1.6% of voucher holders made a
“portability move”).
85. Tegeler et al., supra note 83, at 466-67 (explaining that a “shortage of participating
landlords outside of the urban area, a lack of information about suburban rental
listings[,] . . . transportation obstacles, and a shortage of apartments outside the
city” all contribute to the fact that 96% of minority residents in Rochester, New
York, a sample city studied by the authors, use their Section 8 subsidies within city
limits); see also id. at 478-83 (describing how these same obstacles limit use of
Section 8 vouchers outside of urban areas in areas across the United States).
was to reduce "the isolation of income groups within communities" and to increase "the diversity and vitality of neighborhoods," the program currently is failing to achieve these goals in countless American cities.

A new opportunity-housing vouchers program constructed to effectuate antighettoization theory would build on the model of Section 8 (and could operate as a subpart of Section 8) but would be designed to ensure that participants use rent subsidies to exit the ghetto.

Two design features would distinguish the opportunity-housing vouchers program from Section 8. First, the new program would provide a rental subsidy that can be used only in "communities of opportunity." In turn, "communities of opportunity" would be residential areas with a sufficient amount of job availability, high-performing schools, low crime levels, and other indicators of neighborhood health. One creative idea would be to link the demarcation of


87. Mark A. Malaspina, Demanding the Best: How To Restructure the Section 8 Household-Based Rental Assistance Program, 14 YALE L. & POL’Y REV. 287, 307 (1996) (documenting the "eagerness of Section 8 recipients to move and the wide availability of moderately priced rental housing" but the failure of certificate holders to "leave poor, minority neighborhoods").

88. This is not the first scholarly piece to propose a national voucher program aimed at eliminating racial ghettoization. Alexander Polikoff has proposed that HUD dedicate a portion of the Section 8 vouchers made available each year for use by African-Americans living in ghettos to move to suburbs. Alex Polikoff, A Vision for the Future: Bringing Gautreaux to Scale, in KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM 137, 141 (Philip Tegeler et al. eds., 2005), available at http://www.prrac.org/pdf/KeepingPromise.pdf; see also Alexander Polikoff, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006) (explaining in depth the Gautreaux case and its aftermath). Owen Fiss has proposed a new $50 billion voucher program to help black families in ghettos move to the suburbs. Fiss, supra note 76, at 66. This Note uses Polikoff’s and Fiss’s proposals as a launching pad, but it goes into greater detail about how the suggested opportunity-housing vouchers program would operate (Section II.A) and how it would avoid the pitfalls of deconcentration policies that have failed (Section II.B). This Note also differs from previous proposals in articulating a new theory of justice for housing law—antighettoization theory (Section I.C)—and in proposing a national voucher program that is grounded specifically in that theory.

89. The concept of a “community of opportunity” was developed by John A. Powell, a law professor and housing scholar who testified for the plaintiffs in Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005). In his scholarly work, Powell has created “opportunity maps” for regions throughout the country. These maps demarcate various census tracts as “communities of opportunity” according to measures of economic opportunity, neighborhood health, and educational opportunity. See Powell, supra note 13, at 154.
communities of opportunity with the No Child Left Behind (NCLB) mandates, such that 50% or more of any neighborhood’s schools would have to meet NCLB targets in order to qualify as a “community of opportunity.” Once an opportunity-vouchers program is in place, a tenant applying for a regular Section 8 voucher would have the option of putting her name on a waiting list for either the standard Section 8 voucher or for the new opportunity-housing voucher. If she opted for the latter, she would face more limitations in residential options, but her voucher would carry a higher fair-market-rent allowance so that she could afford housing in a community of opportunity. To prevent a lack of consumer information from hampering the program’s success, PHAs would be required to inform all Section 8 applicants about the availability of opportunity-housing vouchers and to explain the benefits of moving to a high-opportunity neighborhood.

Second, the opportunity-housing vouchers program would differ from Section 8 in that it would use race as a consideration in determining the allocation of rental subsidies. Specifically, Congress (at least in the beginning years) would make vouchers available only to persons living in “racially concentrated ghetto neighborhoods,” setting the parameters for what constitutes “racially concentrated ghettos” after a process of public hearings and


91. The Dallas organization implementing the deconcentration remedy issued in Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999), is directing landlord recruitment efforts to neighborhoods with schools that receive high NCLB rankings. Philip Tegeler, Connecting Families to Opportunity: The Next Generation of Housing Mobility Policy, in ALL THINGS BEING EQUAL: INSTIGATING OPPORTUNITY IN AN INEQUITABLE TIME 79, 91-92 (Brian D. Smedley & Alan Jenkins eds., 2007).

92. Under current law, local PHAs have discretion to set payment rates for Section 8 vouchers at up to 110% of the “fair-market-rent” (FMR) levels in the area. CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE HOUSING VOUCHER PROGRAM 4 (2009), http://www.cbpp.org/files/5-15-09hous.pdf [hereinafter CBPP REPORT]. The FMR is HUD’s estimate of the cost of rent and utilities for 40% of the recently rented units in the metropolitan area. Id. Currently, FMRs are too low to enable Section 8 recipients to rent in suburban neighborhoods. First, FMRs are based on regional averages, and, when “much of a region’s rental housing stock is located in poorer city neighborhoods where lower rental rates prevail, regional FMRs may not be high enough to allow access to many suburban apartments.” Tegeler et al., supra note 83, at 478. Second, due to funding constraints, PHAs often are unable to offer payment rates above 100% of the FMR. Barbara Sard, Summary Table: Housing Voucher Program Policies that Influence Housing Voucher Mobility, in KEEPING THE PROMISE, supra note 88, at 73, 73. Under the proposed opportunity-housing vouchers program, HUD would provide PHAs with sufficient resources to set payment standards at higher levels—up to 120% or even 150% of current FMRs within a region, for example—so that the vouchers could enable renting in communities of opportunity.
consultations with urban policy specialists. In an ideal world, Congress would provide enough funding for the program such that every person living in a highly poor urban neighborhood—regardless of its racial composition—could obtain an opportunity-housing voucher. In a more realistic world where federal funding is limited, Congress cannot or will not provide enough money to make the vouchers universally available, at least in the first years of the program. Accordingly, HUD would instruct public housing authorities to make vouchers available only to those applicants currently residing in neighborhoods defined by a threshold level of poverty and a threshold concentration of racial minorities.

Both the area-limitations feature (for selecting the target sites where vouchers can be used) and the race-consciousness feature (for identifying the neighborhoods where residents will be prioritized when vouchers are disbursed) are essential for an opportunity-housing vouchers program to conform to its normative objectives. First, because the program’s goal is to dismantle the racialized ghetto, not to expand the residential choices of low-income families, it is essential that there be restrictions on where the vouchers are used. The target neighborhoods do not need to be predominantly white, black, or comprised primarily of any other racial demographic. The goal of the program is not integration. But they do need to be true communities of opportunity. Second, because the program’s goal is to interrupt the perpetuation of racial caste through the housing market, not to help all low-income families find housing, it is also essential that vouchers be targeted to those living in racially concentrated ghetto areas until they are universally available.

An opportunity-housing vouchers program is by no means the only conceivable public policy for implementing an antighettoization theory. Rather, one alternative mechanism for dismantling the racialized ghetto would be for the government to provide development grants to entrepreneurs to invest in downtown areas. Many fair housing advocates champion redevelopment initiatives as a preferable means of dismantling racialized ghettos, and such programs have been piloted at the state and federal levels several times in recent decades.

93. For instance, “racially concentrated ghettos” might be defined as urban census areas with poverty rates of 30% or more and a 60% minority threshold. See Robinson & Grant-Thomas, supra note 39, at 23 (describing racial ghettos as generally having these features).

94. For work promoting the use of development grants and enterprise zones to improve the lives of low-income African-Americans in ghettos, see J. Phillip Thompson, Beyond Moralizing, in A WAY OUT, supra note 76; and Tein, supra note 75. For a proposal that is related to the enterprise zone idea but that centers on having the government implement a major public-works program in ghetto areas, see Wilson, supra note 58 (advocating for public-works style programs to transform the ghettos).
From a policy standpoint, a voucher program is a preferable means of realizing an antighettoization theory of justice relative to a revitalization strategy because it is quicker, less costly, and more likely to succeed. Scholars such as Rebecca Blank, Paul Jargowsky, and David Neumark have found that urban “enterprise zone” (EZ) programs undertaken by states during the 1980s and by the federal government during the 1990s created relatively few new jobs, incurred large financial costs, and failed to reach many of the poorest neighborhoods in metropolitan areas. For instance, Blank found that among thirty-seven states that implemented EZs in the 1980s, most failed to attract new businesses to low-income areas. David Neumark and Jed Kolko, after analyzing federally sponsored EZs in California between the 1990s and 2008, concluded that “enterprise zones do not increase employment,” that they do not shift employment toward lower-wage workers, and that the program is ineffective in achieving its primary goals.

Even scholars who are more optimistic about the feasibility of redevelopment strategies concede the high costs of such approaches. For instance, Matias Busso and Patrick Kline of Yale’s Department of Economics applaud the Clinton Administration’s EZ and enterprise community (EC) policies, finding that those programs “substantially affected local labor and housing market conditions” for urban areas. Nonetheless, Busso and Kline’s analysis also shows that from 1994 to 2000, between $1 billion and $3 billion was spent on EZs nationally in order to lift 50,000 individuals out of poverty. This means that about $40,000 was spent rescuing each person from impoverished conditions. In comparison, rental subsidies under the Section 8 program in 2004 averaged approximately $6500 per individual. Assuming that subsidies in the opportunity-housing vouchers program would have to increase by 20% over current levels to enable families to move to communities of opportunity, and

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98. Id. at 9, 27.
100. Cf. H.R. 1851, 110th Cong. § 12(a) (2007) (allowing PHAs to provide subsidies under Section 8 at up to 120% of the FMR). This bill, known as SEVRA, was proposed in order to enhance Section 8’s portability feature. Using SEVRA as a
assuming that national rents stay as high as they were in 2004 (which is unlikely), a cost of $7800 per person would still remain under the opportunity-housing vouchers program, one-fifth of the per-person cost of the EZ strategy.

B. Avoiding the Pitfalls of Prior Deconcentration Programs and Learning from Thompson v. HUD

The opportunity-housing vouchers program may be grounded in a strong theory of justice, and it may be the most efficacious means of realizing justice as compared to alternatives. Still, what are the chances that it will succeed in practice? Efforts to deconcentrate the ghetto have been tried and tested through federal court orders, executive agency programs, and congressional demonstration projects for forty years. These undertakings have varied in realized success. The Moving to Opportunity (MTO) experiment of the 1990s stands as the starkest example of a generally fruitless initiative. MTO’s shortcomings are particularly instructive here because MTO, like opportunity-housing vouchers, was a national program that attempted to deconcentrate through the disbursement of vouchers at the administrative level.

In order for opportunity-housing vouchers to succeed, practitioners must overcome the problems that have tempered the success of deconcentration programs in the past. This undertaking is a serious, but by no means an impossible, one. First, the housing discrimination case of Thompson v. HUD, currently pending in its remedy phase in Maryland federal district court, offers useful instruction for practitioners in overcoming supply-and-demand barriers to housing mobility and in ensuring that the shortcomings of MTO are not replicated. Moreover, beyond Thompson, there are various ways of fashioning a

benchmark, this Note estimates that Section 8 subsidies would need to increase by a minimum of 20% over current levels in the opportunity-housing vouchers program to enable families to move to communities of opportunity.

Subsidies in Section 8 are unlikely to be as high as they were in 2004 going forward because rents in 2004 were artificially elevated due to the housing bubble. GAO Report, supra note 99, at 25, 31. National home prices and rents have already corrected considerably since 2004.

Granted, the $7800 figure refers only to the annual cost per person under the opportunity-housing vouchers program. Once families move to the suburbs, however, they are likely to find employment and to become more self-sufficient. Even assuming a three-year cost of $23,400 per person under the opportunity-housing vouchers program, it would still be only half the cost of lifting someone out of poverty in the enterprise zone programs studied by Busso and Kline.

This Section uses the terms “deconcentration” and “housing mobility” interchangeably. Both terms are meant to refer to government policies that—similar to this Note’s proposed opportunity-housing vouchers program—seek to move minority families from the ghetto into high-opportunity neighborhoods.

deconcentration program so that the subsequent achievement of families who move becomes part of the program itself. This Note proposes original features for the opportunity-housing vouchers program that demand “responsibility-sharing” from the beneficiaries. By incorporating expectations of socioeconomic improvement into the voucher program itself, this Note’s proposal goes beyond anything MTO ever attempted in using vouchers to end racial subordination.

1. The Promises and Perils of Deconcentration

Deconcentration programs have produced a mixed record. On the one hand, there is robust evidence that a well-designed deconcentration project can work, i.e., that it can both dismantle the ghetto and interrupt the perpetuation of racial caste. The most rigorous studies of any court-ordered deconcentration program to date are those by James Rosenbaum and his colleagues at Northwestern University analyzing the remedial order in the Gautreaux housing suit. The Gautreaux order, which grew out of a consent decree from 1976 between HUD and an African-American plaintiff class from Chicago’s poorest neighborhoods, instructed HUD to create new housing vouchers that would move 7100 families out of the ghetto and into the suburbs. Through several econometric studies, Rosenbaum has demonstrated that the Gautreaux program yielded statistically significant socioeconomic gains for the families that participated.

Gautreaux’s success in facilitating residential mobility and socioeconomic gains for moving families was replicated to some degree in other court-ordered deconcentration programs. According to anecdotal reports, the judicial decrees in at least three other housing lawsuits (brought in Memphis, Milwaukee, and Cincinnati) resulted in significant numbers of families moving to the suburbs and remaining there over time. In New York, a group of scholars replicating

105. See Gautreaux v. Pierce, 690 F.2d 616, 621 (7th Cir. 1982) (discussing the consent decree reached in 1976).


108. Hendrickson, supra note 106, at 59-60 (noting the success of programs in Memphis, Milwaukee, and Cincinnati); see also Florence Wagman Roisman & Hilary Boten, Housing Mobility and Life Opportunities, 27 Clearinghouse Rev. 335 (1993) (surveying the outcomes of about a dozen court-ordered deconcentration programs).
the type of study that Rosenbaum used for *Gautreaux* found that a housing decree in Yonkers produced cognizable employment gains for families that moved and lower welfare rates.°

Nonetheless, the majority of deconcentration programs implemented either through courts or through administrative channels since *Gautreaux* has shown quite modest, if not outright disappointing, outcomes. In terms of both dismantling the ghetto and facilitating racial equality more broadly, most programs appear to have fallen short. MTO is the most vivid example. Scholars have found three types of obstacles that tend to undermine mobility programs: demand-side, supply-side, and success-oriented difficulties.

First, on the demand side, African-American families are often reluctant to make voluntary, long-term moves to white neighborhoods. In the Section 8 context today, close to 30% of the minority families who obtain vouchers end up moving to high-poverty neighborhoods.\(^9\) In HOPE VI, a federal program put in place under President Clinton that gives localities block grants for the demolition, rehabilitation, and relocation of public housing projects,\(^{10}\) scholars similarly have found that African-American families tend to move from “vertical ghettos to horizontal ghettos.”\(^{11}\)

Results from MTO also suggest that minority families in racially concentrated neighborhoods hold preferences to remain in those neighborhoods, or in neighborhoods that are similar. MTO was a four-year mobility project authorized by Congress in 1992 that sought to facilitate the deconcentration of ghettos in several U.S. cities. Under the program, minority families in the “experimental” group received housing vouchers that had to be used in census tract areas that were less than 10% poor. In 2003, a comprehensive study of MTO found that, despite the program’s restrictions on where vouchers could be used, the vast majority of MTO participants in the experimental group had chosen to rent in the same central city jurisdiction in which they lived before the program, and in neighborhoods as racially

\(^{10}\) Rebecca C. Fauth, *The Impacts of Neighborhood Poverty Deconcentration Efforts on Low-Income Children's and Adolescents' Well-Being*, 14 CHILD., YOUTH & ENV'TS 1, 12 (2004) (“Compared to stayers, mover adults were more likely to be employed and less likely to receive welfare.”).


concentrated as their original ones. Many of the families who did relocate to more suburban-type neighborhoods moved back within a year or two. These findings certainly are not dispositive on the issue of preferences. First, they do not show that preferences are fixed, were a well-designed counseling program to be established, and second, the MTO results were driven by both the participants' preferences and the availability of rentals. Nonetheless, the combination of results from Section 8, HOPE VI, and MTO do suggest that demand-side preferences, at least to some degree, play a role in tempering the success of deconcentration.

A second factor that undermines the success of mobility efforts is an inadequate supply of housing in nonghetto neighborhoods that is both affordable and open to government-subsidized tenants. This supply-side constraint has been apparent in both congressionally authorized mobility projects and in court-ordered ones. In the Section 8 program, about 11% of families obtaining a voucher are unable to use it within the allotted period of time before it expires. Section 8 participants and HOPE VI users struggle to find apartments they can afford or landlords who will accept them in any neighborhood, and the constraints are even greater in high-opportunity neighborhoods. Similarly, many mobility programs ordered by courts have also failed because of supply-side barriers. In both the NAACP v. *Township of Mount Laurel* and *United States v. Yonkers Board of Education* cases, for example, relatively few families were able to benefit from the mobility remedies that were ordered by the court because there was an inadequate supply of affordable housing (often because resistant suburban communities blocked new housing from being constructed) outside the central city.

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114. *Id.* at 33 (finding that 66% of the families that moved made one or more additional moves and that a substantial number returned to neighborhoods similar to those in which they started).

115. *Id.* at 31 (finding that one “likely” explanation for why MTO participants tended to make horizontal moves to racially concentrated neighborhoods, many of which were in economic decline, was that “families found it easier to rent units” in such places).

116. Cf. CBPP Report, supra note 92, at 8 n.5.

117. 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

118. 624 F. Supp. 1276 (S.D.N.Y. 1985). *Yonkers* was brought as a school desegregation case but culminated in the issuance of a judicial decree related to housing desegregation.

119. Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 Harv. C.R.-C.L. L. Rev. 289, 314-15 (2002) (“Almost twenty years after *Mount Laurel II*, few analysts of the affordable housing problem find much to show for all the time and trouble. . . . The state has not come close to meeting the [low-
Finally, the third factor that has undermined the success of mobility programs in the past has been the failure of families to realize socioeconomic gains once they move from the ghetto to higher-quality neighborhoods. In the Yonkers case, although scholars found evidence of economic gains for adults, they also found that young people who moved to the suburbs showed more behavioral problems and higher school delinquency rates than their counterparts who did not.\textsuperscript{120} In MTO, the failure of deconcentration to produce socioeconomic gains has been striking.\textsuperscript{21} With respect to children in the MTO project, experts unanimously agree that there is “no evidence that MTO moves have led to better educational outcomes.”\textsuperscript{22} Teenage boys who moved have engaged in higher amounts of risky behavior and have been less likely to succeed academically.\textsuperscript{123} For adults in MTO, analysts agree again that there has been “little difference between experimental and control groups in employment, earnings, or welfare receipt.”\textsuperscript{124}

The “success-oriented” obstacles for deconcentration programs underscore the importance of carefully selecting target neighborhoods when implementing mobility programs. Policymakers must ensure that families are directed to areas that are true communities of opportunity. MTO defined the target neighborhoods only in terms of their poverty rates, rather than in terms of a

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  \item income housing supply] targets [in suburban areas that had practice exclusionary zoning]. \ldots Mount Laurel [has] moved few poor people from cities to suburbs.”); id. at 326 (arguing that in Yonkers, “[a]fter a generation of litigation and fifteen years of resolute supervision by a resourceful judge \ldots the remedies remain mostly empty words” and documenting the defendants’ inability to provide new housing supply in higher-income areas).
  \item Fauth, supra note 109, at 12 (“[T]he short-term results garnered from the Yonkers Project are mixed. Overall, adults in the sample responded well to moves as evidenced by their improved economic and health-related outcomes. Youth, however, reported more behavior problems following moves compared with their peers who did not relocate.”).
  \item One important exception has been with respect to mental and physical health outcomes of certain populations. See Jeffrey R. Kling, Jeffrey B. Liebman & Lawrence F. Katz, \textit{Experimental Analysis of Neighborhood Effects}, 75 \textit{Econometrica} \textit{83}, 102 (2007) (finding that moving had “beneficial impacts on mental health” for adults).
  \item Note, however, that the opposite results were shown for teenage girls who moved within the MTO program. See Susan Clampet-Lundquist et al., \textit{Moving At-Risk Teenagers out of High-Risk Neighborhoods: Why Girls Fare Better than Boys} \textit{17-18}, 23 (Princeton Univ. Indus. Relations, Working Paper No. 509, 2006).
  \item Stephanie DeLuca, \textit{The Continuing Relevance of the Gautreaux Program for Housing Mobility: Recent Evidence}, in \textit{Keeping the Promise}, supra note 88, at 25, 29.
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broad array of opportunity indicators. Thus, many MTO adults wound up in neighborhoods with a low job supply, and many MTO students wound up in schools within their original school districts. As the interim review of the MTO program conceded: “One of the lessons of the MTO demonstration is that the poverty rate, while important, may be an overly simplistic way to characterize neighborhoods. Residential environments are multidimensional, and no one measure will capture all the attributes that are important to the life chances of low-income families.” But beyond a careful selection of target neighborhoods, the evidence also suggests that deconcentration programs should be designed to facilitate explicitly the socioeconomic achievement of participating households. Exiting the ghetto certainly opens doors, but it is not a panacea for success.

2. Improving Demand and Supply

The three obstacles that have undermined mobility efforts in the past—supply-side, demand-side, and success-oriented roadblocks—are not insurmountable. This Subsection explores how the pending Thompson v. HUD case offers instructive approaches for overcoming both the demand and supply obstacles to residential mobility. The following Subsection extends beyond Thompson to suggest original ideas for designing programs that maximize the socioeconomic gains of moving families. Together, these observations demonstrate that opportunity-housing vouchers can succeed where MTO and other programs did not.

By way of background, Thompson v. HUD is one of the largest housing discrimination lawsuits brought to date. The case began in 1995, when a class of African-American public housing residents in Baltimore sued HUD and the Housing Authority of Baltimore City (HABC) in federal court. The plaintiffs alleged that, for decades, the defendants had discriminated against minorities when carrying out public housing policies. The result, the plaintiffs claimed, was a public housing stock for African-Americans concentrated almost exclusively in the poor African-American ghettos of East and West Baltimore City, also termed Baltimore’s “impacted areas.” In 1996, the parties reached a partial consent decree resolving some of the issues in the case. Specifically, for 3000 high-rise units in “impacted-areas,” the HABC agreed to undertake demolition and replacement, putting in place 1000 new “hard” units on the same sites and 2000 new units in “nonimpacted areas.” The latter portion

125. Tegeler, supra note 91, at 91.
126. ORR ET AL., supra note 113, at 162.
127. Thompson v. HUD, 220 F.3d 241, 244 (4th Cir. 2000) (“Broadly speaking, impacted areas are areas with high concentrations of public or low-income housing or with high minority populations.”)
128. Telephone Interview with Andrew D. Freeman, Lead Counsel for Plaintiffs in Thompson v. HUD, Brown Goldstein & Levy (Feb. 10, 2010). While the 1996 decree
constituted the “desegregative” part of the settlement. The HABC made virtually no progress, however, on the 2000 desegregative units for the next 8 years. The plaintiffs brought a noncompliance motion in 2002 and reinitiated the unsettled portion of the original case in 2003.

In January 2005, Judge Garbis issued his decision in Thompson v. HUD. Reviewing the gamut of Baltimore City and HUD’s housing practices in Baltimore back to the 1950s, Judge Garbis declined to find the local defendants liable but issued an excoriating opinion with respect to HUD’s liability under the Fair Housing Act (FHA). In March 2006, Judge Garbis held remedial hearings, during which the plaintiffs presented and defended their Proposed Remedial Order. No formal remedy has yet been issued, but the Obama Administration agreed in early 2010 to enter into settlement negotiations.

covered 3000 public housing units in Baltimore, there had been another 6000 to 8000 housing units encompassed within the plaintiff’s complaint about which no agreement was reached. Id. It appears that part of the reason Baltimore was willing to settle on the 3000 units was to take advantage of newly available federal Hope VI funds. See Thompson, 220 F.3d at 244-45.

Telephone Interview with Andrew D. Freeman, supra note 128 (explaining that 1200 of the 2000 desegregative units were to be in the form of vouchers).

The Fourth Circuit later described Baltimore’s actions between 1996 and 2002 as being “jaw-droppingly short of fulfilling their obligations” under the 1996 decree. Thompson v. HUD, 404 F.3d 821, 824 (4th Cir. 2005). In 2003, the HABC finally began to comply with its desegregative mandate. It made available new vouchers for relocation to nonimpacted Baltimore areas and hired two nonprofit organizations to administer the vouchers and provide counseling. Current and former families on waiting lists for public housing were eligible to apply. A recent report finds extraordinary progress under the program thus far. Lora Engdahl, Poverty & Race Research Action Council, New Homes, New Neighborhoods, New Schools: A Progress Report on the Baltimore Housing Mobility Program 3 (2009), available at http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf [hereinafter PRRAC PROGRESS REPORT] (showing that about 1500 families have moved from neighborhoods 80% black and 33% poor to neighborhoods 20% black and 7.5% poor and that the schools in the new neighborhoods are of significantly higher quality).


Id. at 409.


Telephone Interview with Andrew D. Freeman, supra note 128 (explaining that as of February 2010, the parties have begun settlement discussions); see also Order Re: Supplemental Hearing at 1, Thompson v. HUD, No. MJG-95-309 (D. Md. Jan. 15, 2010) (ordering a supplemental hearing “prior to the completion of the Court’s decision regarding the remedy phase of the instant case” given that “[i]t appears that there may be a pertinent change in regard to certain positions taken herein by Defendant [HUD]”). See generally Emily Bazelon & Judith Resnik, There’s a New
The plaintiffs Proposed Remedial Order—which hopefully will be put in place under the pending settlement—is the template for national opportunity vouchers program outlined in this Note. The core of the remedy requested is that HUD create 9000 “desegregative housing opportunities” throughout the Baltimore region, at a rate of 900 per year. The sheer scale of this request is ambitious; to date, the two largest deconcentration orders have called for 7000 and 5000 new housing opportunities, in Gautreaux v. Landrieu and Young v. Cisneros, respectively. All of the new housing opportunities must be located in what the plaintiffs have identified as “communities of opportunity.” Communities of opportunity are neighborhoods in the Baltimore metropolitan area that have reasonable levels of job availability, effective educational institutions, and other indicators of opportunity.

The proposed Thompson remedy is commendable. It contains several essential features for overcoming both the demand and supply issues that have troubled mobility projects in the past.

On the demand side, the plaintiffs stipulated that there be premove counseling, postmove counseling, a regional administration of vouchers, and, perhaps most importantly, that the mobility vouchers be usable only in “communities of opportunity.” Although none of these program features is novel per se, they are among the most effective strategies of encouraging families to move to—and to remain in—the suburbs.

Premove counseling plays a critical role in shaping preferences. In Buffalo, for instance, the mobility project that grew out of the Comer v. Cisneros lawsuit required that, before receiving a voucher, a family attend a counseling

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139. Id. at 19-20.
140. Hendrickson, supra note 106, at 66 (noting that “more aggressive Gautreaux-like counseling” as opposed to “moderate counseling” may be what is necessary to “have an impact on racial segregation”).
orientation, a small group workshop, and several individual sessions. The Comer program has enabled 2000 families to move, and 7 out of 10 have chosen to relocate to high-opportunity (often suburban) neighborhoods. In Baltimore, as part of the pilot mobility program put in place pursuant to the 1996 partial consent decree, premove counseling has gone beyond any deconcentration project to date. The program provides bus tours of the suburbs, "visioning" workshops, credit counseling, and even assistance with paying for security deposits. These services have encouraged approximately 1500 families to move within Baltimore, with 88% relocating from central cities to suburban areas.

Postmove counseling is similarly essential to deconcentration's success. This type of counseling emboldens families to remain in the suburbs after moving. In Dallas, the mobility project that grew out of the Walker v. City of Mesquite lawsuit has provided intensive postmove services, such as school counseling for children and job-search assistance for adults. The administrator of the Dallas program champions these services as critical for the 5000 families who have moved. In Baltimore, the consent decree program offers participants two years of postmove counseling, during which counselors help resolve whatever issue might arise—whether it be "transferring Medicaid benefits, filing taxes or resolving disputes with landlords." Families are also provided employment services and low-cost financing for purchasing used cars.

In mandating premove and postmove counseling, the Thompson plaintiffs adopted a conscientious strategy to follow the models in Buffalo, Dallas, and Baltimore and avoid the MTO model. Although MTO included a counseling component, it was optional for participants and not comprehensive. Most cities implementing MTO only provided counseling at the front end and only in the form of search assistance so families could "meet the locational constraint

142. ROBINSON & GRANT-THOMAS, supra note 39, at 80.
143. PRRAC PROGRESS REPORT, supra note 130, at 16-17.
144. Id. at 3.
145. Tegeler, supra note 91, at 82 ("Recent research on housing mobility programs suggests that—in addition to reinstating the types of front-end interventions used by HUD in the 1990s to expand the range of neighborhoods accessible to voucher families—a more sophisticated effort to assist families after they move will be the key to success in future mobility programs.").
146. 169 F.3d 973 (5th Cir. 1999).
148. PRRAC PROGRESS REPORT, supra note 130, at 20.
149. Id. at 20-21.
within the time for leasing up." This lack of in-depth counseling was unquestionably one reason why so many MTO participants failed to exit the city.

The other two features of the proposed Thompson remedy aimed at preempting demand-side issues are a regional administration of vouchers and a restriction of vouchers to "communities of opportunity." As explained above, the "communities of opportunity" element will ensure that families relocate to places where they can become upwardly mobile, rather than relocate to different but equally unpromising neighborhoods. The regional administration of the vouchers feature will guarantee that families are provided listings of rental units throughout the metropolitan area when they obtain their vouchers, so that their searches are maximally efficient.

On the supply side, the Thompson plaintiffs have proposed an entirely novel approach for overcoming the obstacles that mobility programs have faced. Their main strategy on the supply side is to demand an overhaul of the relationship between HUD and local housing authorities as part of the judicial decree. Under the plaintiffs' proposed remedy, HUD would be required to use every tool in its arsenal to force local housing authorities to provide affordable housing opportunities in middle-class neighborhoods. Specifically, the remedy would require that: (1) HUD condition all new community development grants to Baltimore PHAs on those PHAs' using at least half of the grants to provide housing in "communities of opportunity"; (2) HUD condition its approval of all new redevelopment plans in Baltimore on demonstrations by PHAs that the supply of housing in "communities of opportunity" will be kept constant; and (3) HUD use "the full extent of any power and discretion it possesses to impose conditions on grantees, recipients, beneficiaries, [and] participating...

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150. Orr et al., supra note 113, at 2; see also John Goering, Judith D. Feins & Todd M. Richardson, A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results, 13 J. HOUSING RES. 1, 8, 15 (2002) (noting that PHAs in each MTO site partnered with nonprofit "counseling" agencies and that the "variation in counseling for the treatment group[s]" provided by such agencies was "one of the limitations of MTO implementation").

151. Currently, PHAs regularly breach their regulatory duty to inform Section 8 recipients that they can use their vouchers in the suburbs. A regional administration of vouchers helps solve that problem. Bruce Katz & Margery Austin Turner, Who Should Run the Voucher Program? A Reform Proposal 7 (Nov. 2000) (unpublished manuscript, on file with the Yale Law & Policy Review).

152. Plaintiffs' Proposed Remedial Order at 11, Thompson v. HUD, No. MJG-95-309 (D. Md. May 31, 2006) ("HUD shall not approve a competitive grant application for the use of HUD funds for development in the Baltimore Region unless at least half of the grant funds requested . . . are used to develop public or assisted housing opportunities in Communities of Opportunity.").

153. Id. ("HUD shall not approve any plans for demolition or redevelopment of public and assisted housing in the Baltimore Region that would reduce the number of assisted or affordable units in Communities of Opportunity.").
jurisdictions” to assist in the creation of “housing opportunities in Communities of Opportunity.” In other words, HUD would be required by court order to withhold all types of grants and benefits from Baltimore housing authorities—Community Development Block Grants, tax credits, and even Section 8 vouchers—lest those authorities do everything in their power to increase the supply of affordable housing in the wealthier parts of the Baltimore metropolitan area.

The Thompson plaintiffs’ strategy is novel because, rather than requesting that HUD sponsor new construction and then waiting for local authorities to comply, as was done to some extent in Mount Laurel II, Yonkers, and Walker, the plaintiffs have requested a radical restructuring of HUD’s relationship with local housing authorities. The plaintiffs have sought not to deprive suburban municipalities of any of their usual local prerogatives; rather, municipalities and towns still retain the power to enact exclusionary zoning ordinances or to mount political attacks against the construction of affordable housing. Because all of HUD’s support to Baltimore PHAs would be conditioned on “the creation of housing opportunities” in wealthier neighborhoods, however, the court order likely would change the incentives of suburban communities within the Baltimore area.

In sum, the demand-side and supply-side features that the Thompson plaintiffs have included in their proposed decree carry significant promise in helping the deconcentration program reach its objectives. These features could be transplanted easily into the national opportunity-housing vouchers program that this Note has proposed. In the opportunity-housing vouchers program, HUD would require: (1) that all PHAs provide pre- and postmove counseling to individuals who apply for opportunity-housing vouchers; (2) that opportunity vouchers only be used in “communities of opportunity”; (3) that certain PHAs act as “regional administrators” of the opportunity vouchers in each state, maintaining waitlists and rental listings for the program in large regional areas (ideally, all of Section 8 would be restructured on a regional level, but such a goal is beyond the scope of this Note); and (4) that every PHA takes steps nationally to implement the opportunity-housing vouchers program lest those authorities lose tax credits, block grants, and general Section 8 funding from HUD. This final feature likely will require that HUD set benchmarks for the opportunity-housing vouchers program with all PHAs and then regularly audit PHAs to see that the benchmarks are met.

154. Id. at 12.
155. The one lawsuit in which a remedy along this model was issued was NAACP v. Kemp, 721 F. Supp. 361 (D. Mass. 1989), a case in Boston. The power of the Kemp remedy to overcome supply barriers to deconcentration, however, was limited by a separate flaw; it had not provided for increased fair-market rents in suburban areas.
3. Enhancing Socioeconomic Outcomes

Beyond drawing from the Thompson model, which demonstrates how a deconcentration program can surmount demand and supply issues, practitioners also can use new approaches to ensure that mobility programs overcome “success-oriented” roadblocks. As explained above, previous deconcentration programs have been undermined not only by demand-side and supply-side obstacles but also by “success-oriented” obstacles—the failure of families in deconcentration programs to realize socioeconomic gains after moving. One the one hand, some persons who move from ghettos to communities of opportunity, no matter how perfectly their mobility program is designed, will be unable to find new jobs or improve in school. Human failure is an inevitable part of life; no housing program will completely eliminate it. It also is the case, however, that the majority of deconcentration programs to date, with MTO as the prime culprit, have taken a hands-off approach to facilitating families’ socioeconomic achievement after moving. MTO failed even to specify target neighborhoods where new socioeconomic opportunities for families were guaranteed. Moreover, most deconcentration programs including MTO have left households to decide whether to capitalize on available opportunities after moving.

Besides specifying appropriate target neighborhoods for moving families, which the opportunity-housing vouchers program would accomplish through designating “community of opportunity” targets, deconcentration programs can facilitate socioeconomic gains for movers by requiring “responsibility-sharing” among beneficiaries. Consider three ideas. First, deconcentration programs could require that any household receiving a mobility voucher has at least one adult who is either employed, actively looking for work, or enrolled in an education program. This follows the model of the federal Earned Income Tax Credit, in which being employed is also a necessary precondition for receiving a government benefit. The work/looking-for-work rule in the mobility program might have to be relaxed for extremely poor single-parent households, but the general notion would be that continued rental assistance requires one adult in the family to endeavor to move up the income ladder.

156. See supra Section II.B.

157. See supra notes 125-126 and accompanying text.

158. MTO, for instance, did not provide parents postmove counseling for selecting schools. As a result, children were enrolled in low-performing schools and showed “stagnant test scores.” Lisa Sanbonmatsu et al., Neighborhoods and Academic Achievement: Results from the Moving to Opportunity Experiment, 41 J. Hum. RESOURCES 649, 684 (2006) (explaining that many “MTO movers . . . continue[d] to send their children to schools in their old neighborhoods,” possibly because they “were more comfortable with their children’s original schools” and that this was “one of the most important factors behind the stagnant test scores”).

Second, deconcentration programs could require that families receiving mobility vouchers enroll their children in the highest performing schools—likely magnet and charter schools—in their new neighborhoods. If waiting lists for those schools were full or if families had compelling reasons to choose different schools, allowances could be made. But the general rule would be that rental assistance would also be conditioned on parents’ enrolling their children in the best performing schools available. Third, deconcentration programs could also incorporate “responsibility-sharing” by requiring that families attend regular counseling sessions after moving in order to continue receiving rental support.

These three forms of responsibility-sharing all admittedly would curb the personal freedoms of the participants in mobility programs. On the other hand, these obligations are justifiable in a mobility program from a normative perspective because the entire purpose of housing mobility in the first place is to prevent the racial ghetto from perpetuating racial subordination. The goal of housing mobility, and of the national opportunity-housing vouchers program proposed in this Note, is to realize antighettoization theory and thus interrupt cycles of racial subordination. Accordingly, requiring that families participating in housing mobility programs make sacrifices in furtherance of their own socioeconomic improvement is normatively consistent with the enterprise of housing mobility itself.

C. Incorporating Opportunity-Housing Vouchers into Current Equal Protection Jurisprudence

Given that an opportunity-housing vouchers program would be designed with consciousness of the racial make-up of urban areas, the policy might appear to run counter to the Supreme Court’s contemporary jurisprudence on equal protection. In Parents Involved in Community Schools v. Seattle School District No. 1, the Roberts Court set a high bar against the use of race in government programs. Any time the government “distributes burdens or benefits on the basis” of race, the plurality opinion held, that action must be subjected to strict scrutiny. To withstand challenge under the Equal Protection Clause, the “racial classification” must promote a “compelling” government interest and be narrowly tailored. In Parents Involved, the Court wrote that, to date, it has sustained racial classifications in only two instances: for policies that remedy historical, governmental discrimination and for policies that promote diversity in colleges and universities.

161. Id. at 720.
162. Id. ("[I]n evaluating the use of racial classifications in the school context, [our prior cases] have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination."); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469
RACIAL JUSTICE AT HOME

Nonetheless, there are two lines of reasoning that the Court could use to uphold opportunity-housing vouchers under current law. First, the Court could find that the program survives strict scrutiny. Opportunity-housing vouchers seek to eliminate racial caste, which the Court has deemed (implicitly) a "compelling" interest since Brown v. Board of Education. The program is not aimed at "racial balancing," which the Court surely would reject, but with ending minority group subordination so that remedial programs and diversity measures, which the Court has already sanctioned, ultimately become unnecessary. On the narrowly tailored prong, opportunity-housing vouchers only use race as one factor in determining an allocation of benefits to urban communities, and the Court has deemed this to suffice as "narrow tailoring" for university admissions. Furthermore, "race-neutral alternatives" to dismantling the ghetto would be far less effective. As explained above, ghetto revitalization programs that are "color-blind" would cost significantly more money—and would take decades longer to achieve—than a voucher-based program.

The second line of analysis that the Court could employ to uphold opportunity-housing vouchers under current law is to view the program as falling into the zone of "race-conscious" policies condoned by Justice Kennedy's controlling concurrence in Parents Involved. According to Justice

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163. Parents Involved, 551 U.S. at 722 ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education . . . ."); see also Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding law school admissions policies that use race as a factor to increase diversity in the student body).

164. 347 U.S. 483, 494 (1954) (holding that segregation in public schools must come to an end under the mandate of the Equal Protection Clause, because it "generates a feeling of inferiority [among black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

165. Parents Involved, 551 U.S. at 730-31 ("Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society[, and ] . . . racial balancing has no logical stopping point . . . .") (internal quotation marks and citations omitted).

166. Grutter, 539 U.S. at 339. The Court also has sanctioned government programs that use race as a factor in the employment context, although not formally as part of the narrow-tailoring test. See Johnson v. Transp. Agency, 480 U.S. 616 (1987) (upholding an employment decision in which race was one factor under Title VII).

167. Parents Involved, 551 U.S. at 735 ("Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives'. . . ." (quoting Grutter, 539 U.S. at 339)).

168. See supra Section II.B.
Kennedy, we should reject an "all-too-unyielding insistence that race [not be a factor]" in government programs.\(^{169}\) Rather, race-conscious activities undertaken to equalize opportunities and that are careful to avoid "individual typing by race" should avoid strict scrutiny altogether.\(^{170}\) Applied here, Justice Kennedy's concurrence would uphold opportunity-housing vouchers because they share the two features Justice Kennedy highlighted. First, such vouchers equalize opportunities across racial groups. Second, they use race only as a background factor in determining the distribution of benefits, i.e., in identifying those "racially concentrated ghettos" where residents receive priority in the allocation of opportunity vouchers when applying for the program.\(^{171}\) The program thus avoids "[a]ssigning to each [household] a personal designation according to a crude system of individual racial classifications."\(^{172}\) Just as Justice Kennedy condones "strategic site selection" or the "drawing [of] attendance zones with general recognition of the demographics of neighborhoods" for public schools, he should condone opportunity vouchers in the housing context.\(^{173}\) Although Justice Kennedy's opinion in *Parents Involved* was a concurrence, there have been indications since 2007 that a majority of the Supreme Court now accepts its reasoning.\(^{174}\)

**CONCLUSION**

The Obama Administration has made a bold commitment to help the country's poorest urban populations. And, importantly, the Administration rightly has recast the goal from providing residents of ghettos with better

\(^{169}\) *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring); *see also* id. at 789 (noting that school assignment "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race" advance the legitimate interest in equalizing education opportunity and are "unlikely [to] demand strict scrutiny to be found permissible").

\(^{170}\) Id. at 788-89.

\(^{171}\) *See supra* note 93 and accompanying text.

\(^{172}\) *Parents Involved*, 551 U.S. at 789.

\(^{173}\) Id.

\(^{174}\) Statements by Chief Justice Roberts and Justice Breyer during oral argument in *Ricci v. DeStefano* implied that Justice Kennedy's concurrence has gained majority support among the Court's members. See Transcript of Oral Argument at 49, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1428.pdf ("I have purposefully gone, of course, to the concurring opinion because I believe it's the controlling opinion in *Parents Involved*. . . .") (Breyer, J.); *id. at* 54 ("I thought both the plurality and the concurrence in *Parents Involved* accepted the fact that race conscious action such as school siting or drawing district lines is— is okay, but discriminating in particular assignments is not.") (Roberts, C.J.).
housing to providing residents of ghettos with better residential communities. As the Administration sets out to implement its new vision of urban transformation, it should bear in mind the normative justifications for and the policy efficacy of deconcentration. From a normative perspective, justice in the liberal state demands that the racial ghetto itself disappear. In other words, the government must deliver upon an antighettoization theory. From a public policy perspective, the most efficacious means of implementing the antighettoization principle is to provide minority households with the capability of moving out of ghettos and into communities of opportunity. And though many past deconcentration programs have confronted demand-side, supply-side, and success-oriented roadblocks, there are creative approaches—as exemplified by the plaintiffs’ proposed remedy in Thompson—for overcoming such obstacles.

This Note has proposed that HUD implement a national opportunity-housing vouchers program, likely as a component of the extant Section 8 program, to implement the antighettoization principle. The Obama Administration would not need to seek any new authority for this program because the Federal Housing Act already instructs the Secretary of Housing and Urban Development “affirmatively to further” fair housing, and the opportunity-housing vouchers program would be oriented around exactly that mission. The two obstacles that the Administration would have to overcome would be, first, to attain sufficient funding from Congress for opportunity-housing vouchers, and second, to overcome strict scrutiny review by the Supreme Court. With respect to funding, the Administration would have to make the case that although an opportunity-housing vouchers program would incur a substantial upfront cost, it would be cheaper and quicker than the alternative strategy of transforming every urban ghetto into a revitalized neighborhood. With respect to the Supreme Court, the Administration would have to show that although its program was race-conscious, the government has a compelling justification for pursuing deconcentration and that the program is narrowly tailored to its goal.

The challenges to effectuating antighettoization ideals are considerable. But the cost of not addressing these challenges is the perpetuation of racial subordination—through the mechanism of the racial ghetto—for years to come. The Obama Administration has put urban justice on the presidential agenda; now it is time to deliver.

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176. See supra Section II.C (explaining that the Court’s strict scrutiny test would be triggered by the opportunity-housing vouchers program and analyzing how the policy would fare under that test).