1980

Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylj/vol90/iss2/5

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Tipping the Scales of Justice:  
A Race-Conscious Remedy  
for Neighborhood Transition

Racial segregation in housing¹ is a fact of urban life in modern America.² Although the phenomenon of residential segregation most frequently gains attention when the courts fashion remedies in school desegregation cases,³ its influence on the nation's life is at

1. Sociologists describe the degree of residential segregation by means of the index of dissimilarity, or segregation index. See, e.g., Kantrowitz, *Racial and Ethnic Residential Segregation in Boston 1830-1970*, 441 ANNALS 41, 43 (1979). The index is often expressed as a whole number ranging from 0 (no segregation) to 100 (complete segregation), and reflects the percentage of a group that would have to move to another location to achieve a distribution throughout each area equal to the group's proportion of the city's population. Hershberg, Burstein, Ericksen, Greenberg, & Yancey, *A Tale of Three Cities: Blacks and Immigrants in Philadelphia: 1850-1880, 1930 and 1970*, 441 ANNALS 55, 62 n.9 (1979). Researchers generally interpret an index below 30 as "low" and over 70 as "high." Kantrowitz, *supra* at 43. For a thorough discussion of the meaning of a segregation index number, see K. TAEUBER & A. TAEUBER, *NEGROES IN CITIES* 28-37 (1965).


Since 1970, there has been an increase in the number of blacks leaving urban ghettos for the suburbs. See Lake, *Racial Transition and Black Homeownership in American Suburbs*, 441 ANNALS 142, 145 (1979) (number of black suburban households increased by 49% between 1970 and 1976). It appears, however, that the pattern of residential segregation is repeating itself in suburban neighborhoods. See Farley, *The Changing Distribution of Negroes within Metropolitan Areas: The Emergence of Black Suburbs*, 75 AM. J. SOC. 512, 517-18 (1970) (blacks have clustered in only few of many suburban communities surrounding Chicago). For a comprehensive yet compact compendium of studies on the subject of race and residence, see 441 ANNALS 1 (1979).

3. Geographic separation of whites and blacks often means that transporting students by bus is the most effective method of remedying unlawful segregation in the public schools. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30 (1971) (recognizing busing as effective means of dismantling dual public school system when neighborhood school assignment would be ineffective).

The courts have asserted that school segregation contributes to the problem of residential segregation. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979) (dismissing petitioners's exculpatory argument that school segregation was caused by residential segregation and observing that school segregation is "a contributing cause of housing segregation"). There is disagreement, however, over which way the line of causation runs. See id. at 480 (Powell, J., dissenting) (segregated schools result "primarily from familiar segregated housing patterns, which—in turn—are caused by social, economic, and demographic forces for which no school board is responsible"); A. BICKEL, *THE SUPREME
the same time both less dramatic and more insidious, implicating issues of health, housing quality, and social insularity. In contrast to this segregated reality, the ideal of stable, racially integrated neighborhoods is appealing, both in its own right and as an efficient means of integrating the public schools. One formidable barrier to integrated communities, however, has been the recurrent pattern of residential resegregation: a predominantly white neighborhood becomes temporarily integrated, until whites flee, leaving it predominantly black.

Racial housing-access quotas are frequently discussed as a method for preventing white flight and thus curbing the neighborhood transition process. Such quotas seek to discourage whites from leaving a transitional community out of fear that the area may turn predominantly black; this purpose is accomplished by setting a maximum limit on the number of blacks permitted to enter

---


5. See A. DOWNS, OPENING UP THE SUBURBS 26-28 (1973) (integrated neighborhoods open up job opportunities for blacks); E. GRIER & G. GRIER, PRIVATELY DEVELOPED INTER-RACIAL HOUSING 194-218 (1960) (beneficial characteristics of several interracial communities); R. HELPER, supra note 4, at 7-8 (growing recognition that school segregation cannot be overcome until residential segregation is substantially reduced).


that community. These quotas have been heavily criticized on several grounds. Because many variables affect the residential transition process, arriving at an appropriate quota is difficult. Furthermore, even if accuracy were possible, the quotas run into substantial equal protection problems because they absolutely exclude persons from housing on the basis of race.

This Note suggests a reverse-steering device as an alternative to the access quota. Although this alternative is also race-conscious, it is less restrictive of individual housing choices than the access quota, and is potentially as effective at maintaining stable, racially integrated neighborhoods. The Note begins by describing the neighborhood resegregation process and outlining the access quota that has in the past been put forward to stem that process. The Note then describes the reverse-steering alternative and sets out the relevant legal criteria for determining whether such a device comports with existing statutory and constitutional law. Finally, the Note details the procedural and substantive features of an affirmative marketing proposal that would comply with these criteria.

I. Residential Transition: Problems and Solutions

Sociologists have called the phenomenon of neighborhood resegregation the tipping process, a label that reflects the rapid and seemingly irreversible transition from white to black that afflicts many neighborhoods. Underlying the label is a theory explaining racial transition in terms of the relative numbers of blacks and whites in a given community. The tipping theory posits that every community has a “tipping point,” a specifiable numerical ratio of blacks to whites beyond which the rate of white migration out of a transitional area will increase rapidly, eventually yielding a predominantly black community.
The device most commonly considered in the literature as an effective means of maintaining integration in transitional communities is the racial access quota. Such a quota establishes an upper limit on the percentage of blacks permitted to reside in a given neighborhood, a limit set just short of the tipping point. Its proponents speculate that the quota would effectively prevent resegregation by keeping the number of blacks just below the point at which mass white exodus is expected to occur.

The racial access quota has prompted both constitutional and statutory objections. Some commentators have argued that Title VIII of the Civil Rights Act of 1968, both on its face and in its underlying policy, bars the use of racial quotas in housing regardless of the state interest in integration. Others have argued that

“personal tipping point” that indicates the level of black occupation of the neighborhood at which that individual will decide to leave. See Aldrich, supra note 6, at 342 (once succession process begins, it follows continuous line of expansion). Second, even when neighborhoods do tip, the factual variables are so numerous and intertwined as to make universally accurate predictions of a specific tipping point difficult. See Goering, supra note 9, at 69. Schelling’s model meets these criticisms, however. Even though the rate of community transition may be continuous, Schelling’s analysis demonstrates that, given certain distributions of individual tipping points, the process will become irreversible at some point. Moreover, his model takes into account the variables of different levels of white tolerance and black demand.

Schelling’s model has yet to be employed in predicting the probable pattern of residential succession in an actual neighborhood. Existing evidence nevertheless corroborates the validity of the model’s emphasis on both white attitudes toward interracial living and black demand for housing in the transitional community. National surveys demonstrate that the racial attitudes of white persons influence their decision to move. See, e.g., Pettigrew, Attitudes on Race and Housing, in SEGREGATION IN RESIDENTIAL AREAS 21, 25 (A. Hawley & V. Rock eds. 1973) (71% of responding whites would or might move if blacks moved into their neighborhood in “great numbers”). In addition, it has been empirically demonstrated that the closer a neighborhood is to a predominantly nonwhite area, the greater the probability of racial transition. See Goering, supra note 9, at 74. The clear inference is that black demand for housing is greater in racially changing neighborhoods. The practical analysis in Part III of this Note assumes both the empirical validity of a model such as Schelling’s and the possibility of gathering the type of evidence necessary reasonably to demonstrate the probability of neighborhood tipping in a given area. See pp. 397-98 infra.

12. See p. 378 supra; cf. Goering, supra note 9, at 69-69 (noting how federal courts have discussed possibility of using access quotas to prevent tipping).
13. See Navasky, supra note 7, at 31.
15. See Frederick, The Legality of Affirmative Measures to Achieve and Maintain Integration
Neighborhood Tipping

the racial housing quota is inconsistent with existing equal protection law.\textsuperscript{16} Housing quotas arguably violate the equal protection clause of the Fourteenth Amendment because they stigmatize individual blacks refused housing for racial reasons\textsuperscript{17} and because there are other less restrictive measures available to prevent neighborhood transition.\textsuperscript{18}

An alternative to the access quota as a means of preventing neighborhood resegregation is a device known as affirmative marketing.\textsuperscript{19} This device would employ an ordinance requiring real es-
tate brokers to market houses in a transitional community to white buyers and to direct black customers to houses outside the tipping neighborhood. The affirmative marketing device would not place strict quotas on the number of black residents in the transitional community, but would be a means of assuring that the number of white homebuyers approximately equals that of white homesellers.\(^\text{20}\) Rather than barring access, it would attempt to influence demand.

The legal status of affirmative marketing is at present unclear. Like the racial access quota, the affirmative marketing device requires treating homebuyers differently on the basis of race and thus might arguably conflict with the language and policy of Title VIII.\(^\text{21}\) Moreover, because the device employs racial classifications, it must be reconciled with constitutionally prescribed equal protection principles.\(^\text{22}\) Despite these obstacles, a device can be outlined that, in certain circumstances, comports with applicable statutory and constitutional law.

II. The Statutory and Constitutional Criteria

Title VIII and the Fourteenth Amendment set out the legal principles guiding race-conscious government regulation like the affirmative marketing device.\(^\text{23}\) Although these principles place

---

\(^{11.4-11.18}\) (1979). The term has also been used by the Department of Housing and Urban Development in its regulations governing private developers receiving FHA assistance. See 24 C.F.R. §§ 200.600-.640 (1980). The regulations require these developers to submit an "affirmative marketing" plan to HUD indicating how they intend to promote integrated housing in developments that are backed by federal funds.

This Note employs the term "affirmative marketing" to describe a device that local communities might adopt as a means of preventing racial transition. The device is set out in detail below. See pp. 395-96 infra. The Note uses the term "reverse-steering" to describe the particular real estate broker practice required under the affirmative marketing device.

\(^{20}\) Although the affirmative marketing device does not employ a strict racial quota, it nevertheless relies on a tipping model of neighborhood transition. The device would not be employed until it could be shown, using empirical evidence, that an imminent tipping threat existed. See pp. 397-98 infra. The affirmative marketing device would arguably be effective at preventing residential transition by keeping white buyer demand at a sufficient level to maintain the ratio of whites to blacks in substantial equipoise. See C. RAPKIN & W. GRIGSBY, THE DEMAND FOR HOUSING IN Racially MIXED AREAS 52 (1960) (sustaining white demand is single most important factor necessary to maintain stability of racially mixed areas).

\(^{21}\) See Note, Racial Steering: The Real Estate Broker and Title VIII, 85 YALE L.J. 808, 823 n.57 (1976) (unlawful to steer buyers on basis of race even to foster integration).

\(^{22}\) Like the racial access quota, the affirmative marketing device involves racial classifications that infringe on a person's freedom to be treated without regard to race. For this reason they are subject to the various equal protection analyses presented in the opinions in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). See pp. 388-90 infra.

\(^{23}\) In addition, section 1982 of Title 42 of the United States Code, guaranteeing equal property rights to all citizens regardless of race, has been applied to cases involving racial discrimination in the sale or rental of housing. See, e.g., Sullivan v. Little Hunting Park,
Neighborhood Tipping

substantial burdens of justification upon the municipality adopting such a device, they would legitimate affirmative marketing when it is used in certain circumstances.

A. Title VIII

Section 804 of Title VIII of the Civil Rights Act of 1968 makes it unlawful "to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race." This section has been interpreted to proscribe a set of real estate brokerage practices known as steering. Steering includes the practices of misrepresenting for racial reasons the availability of housing that meets a buyer's specification, showing houses only in neighborhoods composed predominantly of the buyer's race, and influencing a buyer to choose housing on a racial basis. In every steering case that has arisen, however, the marketing practices in question have tended to foster rather than retard racial segregation in housing. No court has specifically addressed the question

Inc., 396 U.S. 299 (1969); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). This Note focuses on Title VIII as the appropriate statutory guide for the affirmative marketing device; it is assumed that the antidiscrimination prohibitions in section 1982 are no more restrictive than those in Title VIII. Cf. Comment, Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers are Sued, 21 St. Louis U. L.J. 170, 174 (1977) (most courts recognize that Title VIII is alternative to section 1982 as means of achieving equal housing opportunity).

The content of each statute supports the view that Title VIII is the proper guide in the case of affirmative marketing. Whereas section 1982 specifies neither the type of party nor property to which it should apply, Title VIII contains provisions clearly directed toward the activities of real estate brokers. See 42 U.S.C. § 3604(d) (1976) (antiblockbusting provision making it unlawful to misrepresent availability of housing solely because of race of buyer or renter); id. § 3606 (prohibiting discrimination in provision of brokerage services). In addition, Title VIII applies by its terms to "dwelling" units. See id. § 3604.

25. Id. § 3604(a).
26. See Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975). The courts concur in the following definition of steering: "Unlawful steering or channeling of a prospective buyer is the use of a word or phrase or action by a real estate broker or salesperson which is intended to influence the choice of a prospective property buyer on a racial basis." Id. (citing United States v. Robbins, 1 Eq. Opp. Hous. Cas. 14,264 (S.D. Fla. 1974)).
whether a reverse-steering practice—that is, one that promotes residential integration—is legal.\textsuperscript{31}

The legislative history of Title VIII does not settle the question. It indicates that a primary congressional intention in passing the legislation was to break up residential concentrations of minorities and to foster integrated living patterns.\textsuperscript{32} Furthermore, the history shows that at the time Title VIII was enacted, it was believed that strict adherence to the policy embodied in its antidiscrimination provisions could only promote this policy of antisegregation.\textsuperscript{33} Congress probably never conceived of, let alone addressed, the question of which policy must yield when the two conflict.\textsuperscript{34} In the case of a transitional neighborhood that is likely to tip absent some kind of race-conscious practice by real estate brokers, therefore, it is fair to say that Congress never resolved whether the antidiscrimination or the antisegregation policy should prevail.

neighborhood); \textit{cf.} United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (de facto segregation in apartment complex declared highly probative of section 3604(a) violation).

\textsuperscript{31} The absence of case precedent on the issue is probably due to the unlikelihood that such reverse steering has ever been practiced by real estate brokers.

\textsuperscript{32} \textit{See} 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale) (one result of Fair Housing Act would be that "rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns"). In addition, Congress intended to promote freedom of choice in housing and to prevent humiliation resulting from racially discriminatory housing practices. \textit{See id. at} 5643 (remarks of Sen. Mondale) (Title VIII gives blacks freedom to move where they will and "removes the opportunity to insult and discriminate against a fellow American because of his color"); \textit{cf.} Dubofsky, \textit{Fair Housing: A Legislative History and a Perspective}, 8 WASHBURN L.J. 149, 153-54 (1969) (in passing Fair Housing Act, Congress intended to help blacks escape ghettos and find better housing, jobs, and educational opportunities). The courts have acknowledged the congressional intention to promote residential integration through Title VIII. \textit{See, e.g.}, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977).

\textsuperscript{33} \textit{See} Rubinowitz & Trosoin, \textit{supra} note 7, at 538 n.178 (Senator Mondale's comments indicate that integrated living patterns were expected outcome of fair-housing provisions protecting individual choice); \textit{Note, supra} note 21, at 822 (proponents of fair-housing legislation sought to attain, \textit{inter alia}, residential integration by ending racial discrimination in housing).

\textsuperscript{34} \textit{See} Ackerman, \textit{supra} note 7, at 303. In Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973), the court resolved this conflict in favor of the antisegregation policy. \textit{See id. at} 1134, 1140 (housing authority may limit number of public housing units available to persons on basis of race if necessary to preserve racially balanced community). The court declared that the city housing authority's affirmative obligation to promote residential integration under section 808(e)(5) of Title VIII, 42 U.S.C. § 3608(d)(5) (1976), outweighed its antidiscrimination duty under the statute. \textit{Id. at} 1133-34. Because no provision of Title VIII imposes a similar affirmative duty on private real estate brokers, the decision fails to resolve the issue of the legality of an affirmative marketing device in the private sector. \textit{Note, supra} note 21, at 823 n.57; \textit{cf.} United States v. Real Estate One, Inc., 433 F. Supp. 1140, 1150 (E.D. Mich. 1977) (although realtor has statutory duty not to promote segregation, he has no duty to integrate). The issue addressed in this Note, however, is not whether Title VIII itself imposes an affirmative duty to integrate on private real estate brokers, but rather whether it permits the local community to impose such a duty.
Neighborhood Tipping

In the absence of clear guidance under Title VIII, valid legal criteria for affirmative marketing practices in housing may be derived from legal principles developed under Title VII of the Civil Rights Act of 1964. The ends and the means employed are similar in the two civil rights statutes: a general prohibition against racial discrimination was intended to foster greater black participation in the mainstream of American life. Like Title VIII, Title VII embodies a policy of improving the general quality of life for blacks in America. Congress hoped that the antidiscrimination provisions in Title VII, which outlaw racially discriminatory practices in private employment, would effectively promote this policy by opening up meaningful job opportunities historically closed to black employees.

The courts have held that certain of Title VII's antidiscrimination provisions can be suspended in favor of its broader policies. Section 703(d) of Title VII, which prohibits racial dis-
crimination in the admission of employees to training or apprenticeship programs,

is not a bar to such discriminatory practices when used by private employers in voluntary affirmative action programs designed to eliminate racial imbalances in traditionally segregated job categories. In upholding such race-conscious practices, the Supreme Court has relied primarily on the legislative history of Title VII, arguing that the congressional intention to expand minority employment opportunities supports the use of racial quotas in job training programs. It has been pointed out, however, that certain portions of the legislative history indicate that several members of Congress explicitly opposed a pro-quota interpretation of Title VII. In the face of this ambiguity, the Court has emphasized both the temporary nature of affirmative employment programs and the fact that they do not severely tram

mel the advancement interests of white employees.

Several considerations suggest that the courts should apply these Title VII principles in determining the legality of affirmative mar-
Neighborhood Tipping

Marketing practices under Title VIII. As in the case of Title VII, the explicit prohibition against discrimination in Title VIII would be suspended to promote its antisegregation policy. If adopted only when necessary to prevent residential transition, the affirmative marketing device would clearly promote the antisegregation policy of Title VIII. Indeed, the case for a temporary suspension of the antidiscrimination policy under Title VIII is even more compelling in the context of neighborhood tipping, where a failure to instigate some kind of race-conscious device would ex hypothesi result in segregation, than in the employment context, where a simple color-

would infringe on the interests of black individuals steered away from the transitional neighborhood. Just as the preferential program did not, however, unnecessarily infringe on the job advancement interests of whites, so too the affirmative marketing device would not significantly interfere with the black buyer’s freedom to acquire suitable housing. The analogy would be closer if the affirmative marketing device mandated that black buyers be steered away from the transitional community only when housing that met their specifications existed in other neighborhoods. See p. 395 infra (describing how affirmative marketing device assumes that suitable housing alternatives are available to black buyers); cf. Barrick Realty, Inc. v. City of Gary, 491 F.2d 161, 164-65 (7th Cir. 1974) (clearly consistent with federal housing policy for city to promote integration and discourage resegregation even if effect is to reduce number of blacks moving into certain areas of city).

Moreover, the affirmative marketing device arguably would work for the long-term interests of all blacks, both those within the transitional community and those steered away from it. Black residents of the community would benefit from a stable, integrated neighborhood, and black buyers would have the option of moving into predominantly white communities, thus opening up new neighborhoods to possible racial integration. See Ackerman, supra note 7, at 291-93 (racial occupancy controls arguably maximize satisfaction of black family housing preferences).

The other distinction between the two affirmative action devices is that the preferential hiring program in Weber involved purely private action, 443 U.S. at 200, whereas the affirmative marketing device, in the form of a state housing regulation indicating guidelines for approval of a local affirmative marketing ordinance, would be state action for purposes of Fourteenth Amendment jurisprudence. This distinction is important only in that it subjects the affirmative marketing device to constitutional tests not applied to the private acts in Weber. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 173 (1970) (noting in dictum that law whose source is town ordinance may offend Fourteenth Amendment even though it has less than statewide application); Avery v. Midland County, 390 U.S. 474, 479-80 (1968) (equal protection clause reaches exercise of state power however manifested, whether exercised directly or through subdivisions of state). This Note argues that the device would pass constitutional muster under certain conditions. See pp. 394-95 infra.

45. Suspension of the antidiscrimination policy in favor of the antisegregation policy in Title VIII yields benefits for blacks that are similar to those fostered by preferential treatment programs in the employment context. These include a better quality of life, increased economic and social opportunities, and an overall integration of blacks into the mainstream of American society. See, e.g., United Steelworkers of America v. Weber, 443 U.S. 193, 202-03 (1979). Moreover, the fact that courts have transferred the “prima facie case” doctrine originally adopted in Title VII employment discrimination cases to housing discrimination cases under Title VIII, see Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), suggests that they will look to Title VII cases for additional doctrinal guidance in the context of race-conscious affirmative marketing cases.
blind hiring policy might eventually produce the desired integration in the work force.\textsuperscript{46}

Furthermore, unlike the legislative history of Title VII on the question of employment quotas, the legislative history of Title VIII contains no statements explicitly prohibiting race-conscious broker activity that promotes integration.\textsuperscript{47} The legislative intent argument is thus, on balance, less of a barrier to the affirmative marketing device under Title VIII than it has been to quota plans already upheld under Title VII.

The Title VII cases also indicate that any remaining ambiguities in the policies and legislative history of Title VII should be resolved in favor of the affirmative marketing device if it comports with certain equitable criteria established in the employment quota cases.\textsuperscript{48} A device that did not substantially restrict the housing opportunities open to prospective black buyers would thus be responsive to the courts' concern under Title VII that individual interests be protected.\textsuperscript{49} Moreover, if the device were used only as an interim measure to prevent an imminent tipping threat, it would satisfy the concern that such measures be temporary.\textsuperscript{50}

B. The Fourteenth Amendment

Traditional equal protection doctrine posits that although all racial classifications are not invalid per se,\textsuperscript{51} they are inherently "suspect" and are thus subject to the strictest judicial scrutiny of both the end sought and the means employed.\textsuperscript{52} The strict scrutiny doc-

\textsuperscript{46} To the extent that a lack of minority representation in the work force has been caused primarily by past discriminatory employer practices, the adoption of a pure colorblind standard would eliminate the primary barrier to what could become, over time, a substantially integrated employment force.

\textsuperscript{47} See p. 385 supra.

\textsuperscript{48} These criteria include the temporariness of the device and the degree to which it protects individual job advancement interests so as to prevent feelings of racial resentment. See United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979).

\textsuperscript{49} Indeed, it is arguable that those job advancement interests of white employees infringed by the preferential treatment program are more established and thus when infringed more likely to produce resentment than the black homebuyers' interests in living in a specific neighborhood. Cf. J. Kain & J. Quigley, Housing Markets and Racial Discrimination: A Microeconomic Analysis 26 (1975) (people choose housing according to "bundle" of desired attributes; location is only one of several characteristics determining residential choices). Any reverse-steering device that automatically restricted the black buyer's housing opportunities to predominantly black neighborhoods, however, would be counter to that buyer's interests.

\textsuperscript{50} See note 48 supra.

\textsuperscript{51} See United Jewish Organizations v. Carey, 430 U.S. 144, 171 (1977) (Brennan, J., concurring in part); Ackerman, supra note 7, at 271; Developments, supra note 7, at 1106.

\textsuperscript{52} See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) (racial distinctions of any sort inherently suspect and thus call for most exacting judicial ex-
Neighborhood Tipping

trine suspends normal judicial deference to legislative acts\textsuperscript{53} and forces the court to investigate the closeness of the fit between the allegedly legitimate purpose and the means adopted to achieve it.\textsuperscript{54} Before courts began to consider race-conscious affirmative action plans, the strict scrutiny test was nearly always fatal to what were usually invidious racial classifications.\textsuperscript{55}

When racial classifications voluntarily adopted by a public or private entity are employed as a means of benefiting a minority group rather than as a tool for subjugation or segregation, the courts should replace the traditional means-ends test of strict scrutiny with a group-stigmatizing test. Under such a test, the court, once confident that a particular legislative or administrative device will in fact benefit a minority group, inquires into whether the ra-

\textsuperscript{53} See Note, Mental Disability and the Right to Vote, 88 YALE L.J. 1644, 1648 (1979).

\textsuperscript{54} See Fiss, Groups and the Equal Protection Clause, 5 PHILOSOPHY & PUB. AFF. 107, 113-14 (1976). Under standard strict scrutiny analysis as applied to racial classifications, if the means employed to achieve a particular state purpose are not "precisely tailored" to the end sought, then the law is invalid. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.).

In the school desegregation cases, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), racial classifications employed by school officials to comply with court-ordered remedies for past constitutional violations are not deemed "suspect," and are thus not subject to judicial scrutiny. See Developments, supra note 7, at 1105 n.171 (in school cases, constitutionality of classification already confirmed by court ordering desegregation, so implementation of plan involves no independent constitutional inquiry). Similarly, strict scrutiny is avoided when public housing officials adopt race-conscious policies as a means of undoing the effects of past discriminatory behavior. See Hills v. Gautreaux, 425 U.S. 284 (1976); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); Shannon v. United States Dep't of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970).

\textsuperscript{55} See Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (strict scrutiny is "'strict' in theory and fatal in fact"). A general discussion of the evolution of the strict scrutiny test is beyond the scope of this Note. It must be noted, however, that the existing test goes beyond a scrutiny of the causal fit between ends and means and inevitably forces the court to balance society's interest in achieving an arguably legitimate goal against a particular individual's interest in being treated as a human being without regard to race. See Developments, supra note 7, at 1103-04.

The two aspects of the suspect classification analysis, scrutiny of fit and balancing of interests, are illustrated in Justice Powell's opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In that opinion, Justice Powell scrutinized the fit between the use of racial admissions quotas and the goal of eliminating the effects of identified racial discrimination; he concluded that the university had not proven that the racially classification means was responsive to the effects of the discrimination. Id. at 309-10. In addition, Justice Powell asserted that because the admissions quota plan infringed so severely on an individual's rights under the Fourteenth Amendment, the school's goal of attaining racial diversity per se was not sufficient to outweigh the harm to the individual. Id. at 315-20.
cial classification employed will stigmatize any individual on the basis of race.\textsuperscript{56}

Such a theory of judicial review in the context of benevolent racial classifications is supported by the opinions in several recent cases.\textsuperscript{57} The group-stigmatizing doctrine was enunciated outright in the case of \textit{Regents of the University of California v. Bakke}\textsuperscript{58} by the

\textsuperscript{56} The "group-stigmatizing" test obviously necessitates a precise definition of the concept of stigma. This Note adopts the definition of stigma proffered by the Brennan-group in \textit{Regents of the Univ. of Cal. v. Bakke}, 438 U.S. 265, 357-58 (1978) (racial classifications stigmatize when they presume inferiority of one race or when they put weight of government behind racial hatred and separatism).

\textsuperscript{57} The principal support for the group-stigmatizing theory is found in the opinions in \textit{Regents of the Univ. of Cal. v. Bakke}, 438 U.S. 265 (1978). In addition, the Court in \textit{United Steelworkers of America v. Weber}, 443 U.S. 193 (1979), demonstrated a similar tendency to focus on stigma-type concerns. There the Court underscored the fact that the craft-training affirmative action program was temporary and did not significantly trammel the advancement interests of white employees as preventative protections against producing racial hostility or resentment. See \textit{id.} at 208. Moreover, in \textit{Fullilove v. Klutznick}, 100 S. Ct. 2758 (1980), Justice Marshall adopted the group-stigmatizing theory in support of the minority business set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. III 1979), 100 S. Ct. at 2795-97. In dissent, both Justices Stewart and Stevens acknowledged the import of stigma-type concerns, but disagreed with Justice Marshall that such harms would likely result from the set-aside provision. \textit{id.} at 2802-03 (Stewart, J., dissenting) (preferential programs reinforce common stereotypes of groups as unable to achieve without special protection and encourage private discrimination by fostering notions of racial entitlement); \textit{id.} at 2809 (Stevens, J., dissenting) (preferential treatment statutes will be perceived to be drawn on assumption of racial inferiority and will exacerbate racial prejudice).

Finally, the lower federal courts frequently address such stigmatic concerns in deciding hiring and promotion quota cases. See, e.g., \textit{Detroit Police Officers Ass'n v. Young}, 608 F.2d 671, 695-97 (6th Cir. 1979), \textit{petition for cert. filed}, 48 U.S.L.W. 3466 (Jan. 10, 1980) (No. 79-1080) (noting difference between effects of hiring and promotional quotas as difference in likelihood of exacerbating racial hostility); \textit{Bridgeport Guardians v. Bridgeport Civil Serv.}, 482 F.2d 1333, 1341 (2d Cir. 1973) (noting how promotion quotas may be more harmful than helpful to blacks because of potential for exacerbating race hostility).

\textsuperscript{58} 438 U.S. 265 (1978). In \textit{Bakke}, a state medical school had adopted the practice of setting aside a fixed number of seats for minority admissions in order to promote, \textit{inter alia}, the goal of diversity in the student body. Justice Powell, in his opinion announcing the judgment of the Court, declared that Title VI of the Civil Rights Act of 1964 proscribed only those racial classifications that would violate the equal protection clause. 438 U.S. at 287. Applying equal protection doctrine to the racial quota system, Justice Powell held it unconstitutional, emphasizing its severe infringement on personal rights. \textit{id.} at 320.

The Brennan-group opinion, including Justices Brennan, White, Marshall, and Blackmun, concurred in Justice Powell's judgment that Title VI's prohibitions are coextensive with the equal protection clause, but differed on the substantive interpretation of the appropriate constitutional principles to be applied. \textit{id.} at 361-62 (Brennan, J., concurring in part and dissenting in part). Justice Stevens, joined by Justices Burger, Stewart, and Rehnquist, interpreted Title VI to prohibit the Davis quota program, making it unnecessary to consider the constitutional issues. \textit{id.} at 412 (Stevens, J., concurring in part and dissenting in part).

Like the distinction between affirmative marketing and the preferential program in \textit{United Steelworkers of America v. Weber}, 443 U.S. 193 (1979), see note 44 supra, there is a distinction between the affirmative action in \textit{Bakke} and the affirmative marketing device. The former achieves its goal by infringing to some extent on the interests of white persons,
Neighborhood Tipping

Brennan-group opinion. In that opinion the Justices asserted the constitutionality of a race-conscious affirmative admissions program at Davis Medical School. They argued that the program was constitutionally valid because it served the legitimate purpose of overcoming the present effects of past racial discrimination in a way that avoided stigmatizing any person on the basis of race. The Brennan-group opinion characterized racial classifications as stigmatizing when "they are drawn on the presumption that one race is inferior to another" or when "they put the weight of government behind racial hatred and separatism." Although Justice Powell explicitly rejected any adherence to the group-stigmatizing theory in his opinion in Bakke, his approbation of the "Harvard Plan," in which race is used as a so-called "plus" factor on an individual's application, belies that rejection. A system that considers race as a plus factor is less restrictive, and thus more acceptable, whereas the latter infringes to some extent on the interests of blacks. Dicta in both the Powell and the Brennan-group opinions suggest that the Constitution would not permit an affirmative action program that places a burden on an individual in order to enhance the societal interests of that person's ethnic or racial group. 438 U.S. at 298, 361.

The underlying constitutional principles set out in the two opinions do not, however, necessarily mandate an invalidation of the affirmative marketing device on equal protection grounds. The Brennan-group's test requires a showing that the racial classification serves an important purpose and avoids stigmatizing individuals on the basis of race. Id. at 361-62. Justice Powell adopts a "personal rights" theory of the equal protection clause and cites the Harvard admissions plan as one that vindicates the underlying values of his theory. Id. at 316. In light of the effective differences between the Harvard and Davis plans, Justice Powell's theory can only be made coherent if read as a substantive equivalent to the Brennan test. See note 65 infra. This Note argues that an affirmative marketing device could comply with the constitutional principles enunciated by both the Powell and the Brennan-group opinions. See pp. 398-99 infra (affirmative marketing device avoids stigmatizing those black individuals effectively excluded by it).

59. Although Justice Brennan's name appears first in the list of authors, it is clearly indicated that the opinion is to be viewed as if it had been written by each individual Justice. 438 U.S. at 324.

60. Id. at 369-76; cf. Fullilove v. Klutznick, 100 S. Ct. 2758, 2795-97 (1980) (Marshall, J., concurring) (group-stigmatizing theory as basis for upholding federal public-works funding that allocated 10% of funds for procuring works projects from minorities).

61. 438 U.S. at 357-58.

62. Id. at 294 n.34. Powell's rejection was based on the view that as a constitutional principle the stigma theory had no textual basis and was a subjective and thus standardless test. Id. In addition, Powell pointed out that denying white applicants seats in medical school based on a quota system would likely produce feelings of mistreatment and unfair deprivation. In this respect, he implicitly accepts the normative import of the "racial resentment" prong of Brennan's stigma definition and merely disagrees with Brennan as to whether the Davis admissions program would in fact produce "racial hatred and separatism."

63. See id. at 316-19. The Harvard plan is set out in an appendix to Powell's opinion. See id. at 321-24.

64. Justice Powell purports to follow traditional strict scrutiny analysis in his invalidation of the Davis plan on the grounds that "less restrictive" alternatives are available. Al-
than a quota system only in the sense that it is less likely to produce undesirable stigma. Justice Powell's approach, therefore, in logic if not in exposition, is best understood as a version of the group-stigmatizing theory.

The substantive merits of a group-stigmatizing theory are two-fold. First, it focuses on those underlying values that are of most concern in an affirmative action context. Rather than scrutinizing simply the closeness of the fit between means and ends, as in the strict scrutiny approach, such a theory directs the court's atten-

though he fails to mention explicitly this aspect of the strict scrutiny test, it can be inferred from the opinion that Powell believes a Harvard-type plan infringes less upon individual rights than does the Davis plan. See id. at 315-17 (quotas not necessary to achieve diversity when more flexible opportunities available); cf. id. at 357 (Brennan, J., concurring in part and dissenting in part) (suspect classifications can be justified only when no less restrictive alternative available).

65. Justice Powell distinguished the Harvard practice of considering race as a “plus” factor from the Davis quota system on the ground that the former plan treated each applicant “as an individual,” id. at 318, and did not totally exclude anyone from a particular seat solely on the basis of race. See id. (under Harvard plan no candidate “foreclosed from all consideration” of any one seat because of race); id. at 320 (“fatal flaw” in Davis plan was its “disregard of individual rights as guaranteed by the Fourteenth Amendment”). The distinction, however, is illusory. When race may be considered as one factor in the admissions process, then it may be the deciding factor in a particular case: one candidate may be admitted ahead of an otherwise more qualified candidate solely because of race. Karst & Horowitz, The Bakke Opinions and Equal Protection Doctrine, 14 HARV. C.R.-C.L. L. REV. 7, 8 (1979); see Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 318 (Powell, J.) (acknowledging that candidate may lose out to another solely on basis of race). Assuming that equal diversity targets are established, the two systems are equally exclusionary.

The main advantage of the Harvard plan is that it is responsive to the problem of group stigmatization. See Karst & Horowitz, supra at 14-15 (Justice Powell's concern for white resentment aimed at avoiding feelings that Brennan-group characterizes as stigma). Under the Harvard plan, a numerical quota is not explicitly predetermined, but rather is formulated less overtly in the process of deciding how great a “plus” to give a minority applicant. See id. at 9 (admissions committee, in determining how much extra weight to place on race of minority applicant, must ask itself how much diversity is appropriate). In addition, the Harvard plan is viewed as achieving the goal of diversity rather than the goal of remedying past societal discrimination against blacks. Both of these differences mitigate the kind of feelings of racial hostility and inferiority that the Brennan-group characterized as stigmatizing. A white denied admission under the Harvard plan cannot complain that he was totally excluded from certain seats merely because of race. Minority applicants admitted partly because they add to diversity are being told, not that their race necessitates special help in the admissions process, but rather that their race is in its own right an asset to the school.

66. A group-stigmatizing theory would not ignore the necessity of demonstrating some substantial relation between the racially classificatory means and the end sought. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 358-59 (Brennan, J., concurring in part and dissenting in part) (beneficent racial classifications “must be substantially related to achievement” of “important governmental objectives”). Such a test does, however, emphasize the need for close scrutiny of means and ends and focuses more directly on the substantive results aimed at by the racial classification. One can also view the “substantially related” aspect of this test as merely vindicating the substantive value of preventing stigma itself. Any governmental racial classification that is not substantially related to the impor-
Neighborhood Tipping
tion to a consideration of potential consequences of affirmative ac-
tion programs that may prove counterproductive to the enterprise
of benefiting minority groups. Such consequences include the pos-
sibility of stamping a minority person with a badge of inferiority
and the chance of exacerbating racial resentment and hostility by
subverting the interests of white persons competing with minorities
for educational, housing, and employment opportunities. Second,
the group-stigmatizing theory fills out the strict scrutiny approach
by describing more precisely the kind of potential harm to the indi-
vidual that can be produced by a race-conscious government pol-
icy. In this way the theory may be viewed as fleshing out the
compelling state interest aspect of strict scrutiny analysis.67

Applying the group-stigmatizing theory to the affirmative mar-
keting device indicates under what circumstances the device is con-
stitutionally permissible. Under the theory, the most important cri-
terion of constitutionality is whether the device would be likely to
produce racial stigma. A community adopting an affirmative mar-
keting plan would therefore be required at the outset to demon-
strate both that the device would avoid stamping an individual with
a badge of inferiority due to race and that the device would not
spawn racial antagonism.

In addition, the group-stigmatizing theory would necessitate a
demonstration that the affirmative marketing device would in fact
benefit minorities.68 Several considerations suggest that preventing
residential resegregation and thereby fostering integrated neigh-
borhoods would have beneficial results.

First, both the courts and commentators have affirmed that inte-
tant interest of benefiting minorities must be presumed an invidious and thus stigmatizing
racial classification.

It has been argued that affirmative housing marketing devices similar to the one pro-
posed in this Note would pass constitutional muster under standard strict scrutiny. See
Note, supra note 35, at 952, 961-62. This Note argues for the constitutionality of such a de-
vice, not by fitting it into the traditional categories of the strict scrutiny test, but rather by
arguing that under a new and more appropriate group-stigmatizing test, such a device
would comport with the requisite conditions. See pp. 398-99 infra.

67. Although in the end the group-stigmatizing theory may require some balancing be-
 tween governmental and individual interests, it is more explicit in characterizing the type
of individual interest to be protected. The "compelling state interest" aspect of the strict
scrutiny test has been criticized precisely because the courts are given no criteria for
determining what interests are "compelling" enough nor what is the exact nature of the in-
dividual interests against which the governmental interest is weighed. See Note, supra note
53, at 1649.

68. The ends-means scrutiny is not wholly disregarded under the proposed test, see
note 66 supra, but is relegated to less exacting inquiry by the courts. See Regents of the
Univ. of Cal. v. Bakke, 438 U.S. at 359 (Brennan, J., concurring in part and dissenting in
part).
grated neighborhoods are valuable in their own right. In the long run, interracial living patterns will help to eradicate persistent racial hostilities that presently prevent many blacks from advancing their own social interests. Second, sociologists have thoroughly documented the evils stemming from segregated housing patterns. Predominantly black neighborhoods often suffer from poor housing facilities, overcrowding, health hazards, lack of sufficient public services and utilities, and a general sense of social isolation. Finally, integrated neighborhoods are an appealing tool for maintaining integrated public schools. Courts and commentators agree that a primary barrier to integrating public school systems is residential separation of the races. City officials attempting to fight de facto school segregation recognize that long term success ultimately depends on reducing residential segregation. Even where substantial school desegregation has been achieved by busing students away from neighborhood schools, the costs of this approach, in terms of time, inconvenience, and energy, make integrated neighborhoods appear all the more desirable.

The requirement of a "substantial relation" between means and ends would at least necessitate that the use of the device be restricted to situations where it is both necessary and effective in preventing residential resegregation. A transitional community using an affirmative marketing device thus would bear the burden

69. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979) ("'[T]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.'") (quoting Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 88, 94 (1977)); E. GRIER & G. GRIER, supra note 5, at 194-218 (describing benefits of integrated communities). In Gladstone, the Court held that the goal of maintaining interracial living patterns was sufficiently desirable to give a transitional community itself standing to sue realtors for racial steering practices that threatened the racial balance of that community. 441 U.S. at 109-11; cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (granting residents of apartment building standing to sue owner for discriminatory practices that threatened stability of existing racial balance).

70. See note 4 supra.

71. R. HELPER, supra note 4, at 7-14.


73. R. HELPER, supra note 4, at 8.


75. See note 66 supra.
of demonstrating that without the device the neighborhood would be likely to turn predominantly black.\textsuperscript{76} If a community with a substantial black population is not under an imminent threat of tipping, adoption of the affirmative marketing device would serve no purpose but to keep more blacks from entering the neighborhood.\textsuperscript{77} In addition, the transitional community would have to show that the device would be an effective means of preventing resegregation.\textsuperscript{78}

III. The Affirmative Marketing Proposal

In substance, the proposed affirmative marketing device would take the form of a law ordering all real estate brokers showing houses in a transitional neighborhood to adopt certain race-conscious marketing practices with respect to those houses.\textsuperscript{79} The law would mandate that these brokers show at least one house in the transitional community to all white buyers whose specific housing preferences can be met by a residence for sale in that community. In addition, the law would order the brokers to show black customers all housing that meets their particular specifications, except for houses located in the transitional community.\textsuperscript{80} Finally, the law would order real estate brokers to show available houses in the transitional community to those black buyers who specifically request to see houses in that neighborhood.

Certain procedural safeguards should be adopted in order to

\textsuperscript{76} Cf. Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 718, 721 (2d Cir. 1979) (interpreting \textit{Bakke} to mandate school board showing that without maximum quotas on minority students, massive white flight will occur).

\textsuperscript{77} State action preventing blacks from entering a neighborhood for the sake of segregation has been explicitly held unconstitutional. Buchanan v. Warley, 245 U.S. 60, 80-81 (1917).

\textsuperscript{78} Such a requirement stems from the substantial relations aspect of the group-stigmatizing test. \textit{See} note 66 \textit{supra}.

\textsuperscript{79} The term “transitional” applies to a neighborhood that the state agency has determined is under an imminent threat of tipping from white to black. \textit{See} pp. 396-97 \textit{infra}. Throughout this Note it is assumed that such a thing as a well-defined neighborhood exists; some, of course, are better defined than others. \textit{See} Schelling, \textit{supra} note 11, at 322. When a particular community applies for affirmative marketing approval from the state housing agency, it will have to delineate the boundaries of the area to which the affirmative marketing ordinance will apply.

\textsuperscript{80} This feature of the affirmative marketing device presupposes that there are other neighborhoods in which suitable housing can be found. Thus, the device is primarily designed to deal with tipping situations where there are large conglomerations of many subcommunities such as exist in the major metropolitan centers of the United States. In addition, this feature of the device requires real estate brokers to show black buyers all suitable housing that is available outside the transitional community; it would thus prevent brokers from simply steering their black customers to predominantly black communities.
prevent the affirmative marketing device from being misused. A governmental entity other than the officials seeking to employ the device should be responsible for evaluating the factual evidence upon which the legality of the device rests. The most appropriate entity for this purpose would be the state fair-housing agency. Not only would this agency have the most expertise in making the difficult factual findings on neighborhood transition rates, but it would also be aware of the housing patterns of the broader geographic area in which the transitional community is located. Under this arrangement, the state fair-housing agency would promulgate regulations setting out procedures whereby local communities could secure approval for the use of an affirmative marketing device.

When a transitional community, through its town council or local fair-housing office, applies to the state agency for affirmative

81. The relevant statutory and constitutional law indicates that the affirmative marketing device could be legally employed only if certain factual conditions were first met. A community seeking to employ the device must demonstrate at the outset that a tipping threat exists, that a race-conscious device is necessary to prevent resegregation, and that the device would be effective in curbing the transition process. See pp. 386-88 supra (statutory legitimacy of affirmative marketing depends on whether it is necessary to further antisegregation policy of Title VIII); p. 394 supra (constitutionality of device depends on its “necessity” in maintaining residential integration).

82. See Eq. Opp. Hous. (P-H) ¶ 2301 (1973) (state fair-housing laws usually provide for administrative agencies with enforcement authority). In states without fair-housing agencies, legislation may be required.

83. Macro-level demographic patterns have a significant effect on local neighborhood transition. Goering, supra note 9, at 71. The probability of tipping varies depending on the various shifts in black and white demands for housing in the metropolitan areas. Id. An accurate determination of whether a tipping threat exists must therefore take these factors into account.

84. This procedure would operate in a fashion similar to the affirmative marketing procedures promulgated by the Department of Housing and Urban Development. See 24 C.F.R. §§ 200.600-640 (1980). Under these regulations, all applicants for participation in FHA subsidized housing programs, including private developers, must submit, on a form supplied by HUD, an affirmative marketing plan indicating how they will comply with the affirmative marketing regulations. Id. § 200.625. Similarly, the state fair-housing agency would require the transitional community to supply the requisite empirical evidence establishing the necessity of an affirmative marketing ordinance in preventing resegregation. See pp. 397-98 infra.

The state housing agency’s determination of the necessity and thus the legality of an affirmative marketing device should be subject to judicial review, as are most administrative agency determinations. The reviewing court would be required to scrutinize the racial classifications employed by the device to determine if they are necessary to prevent tipping. The courts have been required in the past to make similar evidentiary judgments. See Parent Ass’n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 720 (2d Cir. 1979) (judgment whether tipping threat exists); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1137 (2d Cir. 1979) (same).

85. For examples of local fair-housing offices, see U.S. Dep’t of Housing and Urban Development, Registry of Private Fair Housing Organizations/Groups (1977); cf.
Neighborhood Tipping

marketing approval, it would initially have to demonstrate that it is under an imminent threat of shifting from white to black. Since transition patterns vary from one community to the next, the mere assertion that a certain percentage of community residents are black would be insufficient to meet this requirement. Instead, the community would have to demonstrate to the state agency that the distribution of individual tipping points of white persons in the neighborhood indicates that the transition process from white to black would become irreversible unless the number of black residents was kept below a certain percentage level. Evidence of individual tipping points could be produced on the basis of general attitude surveys. In addition, the community would have to demonstrate that the black demand for housing in that area was sufficient to produce an overall increase in the percentage of blacks in the community.

Once a tipping threat is established, the community would next be required to demonstrate that the affirmative marketing device would be effective in preventing residential transition. Evidence indicates that the most important factor in maintaining racial stabil-

Mitchell & Smith, Race and Housing: A Review and Comments on the Content and Effects of Federal Policy, 441 ANNALS 168, 184 (1979) (recommending that HUD require, as condition to receiving community development funds, that local communities designate appropriate community agency to oversee local housing activities).

86. See Goering, supra note 9, at 68-69 (although modern estimates of tipping point congregate around 25% to 30% blacks, there is no universally accurate point). As Schelling's model indicates, the rate of transition and the point at which it becomes irreversible depend on the distribution of personal tipping points of individual white persons in the community. See note 11 supra.

87. An “individual tipping point” is defined as the percentage level of blacks in a given community at which a white decides to leave the neighborhood. See Schelling, supra note 11, at 309-10.

88. See note 11 supra (explaining theory for prediction of neighborhood tipping).

89. See, e.g., Pettigrew, supra note 11, at 25.

90. Evidence of substantial black demand would be established by showing that the percentage of black residents in the transitional community had increased steadily since the first blacks entered that neighborhood. In addition, the community could demonstrate that, absent some form of race-conscious control, the percentage of blacks would be likely to increase in the future by showing that predominantly black neighborhoods or other transitional communities were located nearby. See Goering, supra note 9, at 74 (higher probability of racial transition for neighborhoods closer to predominantly nonwhite areas).

The community could buttress its case for the existence of an imminent tipping threat by producing evidence of other factors associated with the tipping process. These factors include recent declines in the quality and delivery of public services, and real estate broker activities that encourage the tipping process. See id. at 73-74. The latter lead to an increase in the number of black persons that buy houses in transitional areas, whereas the former foster white flight away from the area by generating expectations that the overall quality of life in the neighborhood will continue to decline.

91. See p. 395 supra.
ity in transitional neighborhoods is maintaining white buyer demand for housing in that area. The affirmative marketing device would be likely to promote white demand while simultaneously curbing any rapid influx of black buyers into the community, and so would preserve racial stability.

Most importantly, the transitional community would have to demonstrate that the affirmative marketing device does not promote unconstitutional stigma. The proposed device minimizes the chance that anyone would be individually stamped with a badge of inferiority. Every buyer requesting housing in the transitional community would be shown houses there. People would not be told that they may not live in a given neighborhood merely because of their race. Unlike a strict quota, therefore, the effective exclusion of those black buyers who fail to request housing in the transitional community avoids stigmatizing them.

Although the affirmative marketing device may be attacked on the ground that it produces undesirable stigma by officially recognizing the white racial fears that contribute to tipping, the

92. See C. RAPKIN & W. GRIGSBY, supra note 20, at 52; Goering, supra note 9, at 71.
93. Because the affirmative marketing idea has never been employed as a mandatory anti-tipping ordinance, evidence that it will be effective at preventing tipping may be difficult to produce at first. The state fair-housing agency might allow the device to be employed without an adequate demonstration of efficacy, subject to review after more substantial evidence has been obtained. The efficacy criterion would also require that the community demonstrate how the device could be enforced effectively against local real estate brokers. Present fair-housing laws are often enforced through the use of "testers." See Comment, supra note 23, at 184 (discussing Title VIII case brought through use of testers). The community could adopt a similar strategy, sending out persons in black and white pairs to local realtors to "test" whether the real estate broker is complying with the mandate of the affirmative marketing ordinance.
94. As previously indicated, see pp. 391-92 supra, this criterion is explicitly stated in the Brennan-group opinion in Bakke, 438 U.S. at 357-58, 361-62. In addition, it may be viewed as an application of Justice Powell's constitutional test for race-conscious affirmative action devices. See note 65 supra.
95. Some exclusion of black buyers is necessary in order to prevent a neighborhood from tipping. The affirmative marketing device is designed to effectuate that exclusion by forcing real estate brokers to steer those black buyers having no specific locational preferences away from the transitional neighborhood. By excluding only those black buyers who are unaware of the exclusion, the device achieves its purpose without producing feelings of racial inferiority. In this way, the device is more responsive to the courts' concern about stigma than is the housing-access quota. Given the fact that courts have been willing to allow quotas for minorities in order to prevent tipping in both public housing projects and public schools, see Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973), it is likely that they would accept a device that achieves the same integration goal while simultaneously avoiding the stigma problem.
96. See Developments, supra note 7, at 1113; cf. Bittker, supra note 17, at 1419-20 (ordinance mandating 50-50 black-white ratio "is tantamount to an official finding that Whites will not live side-by-side with Negroses except under legal compulsion"). Blacks might inter-
Neighborhood Tipping

community could rebut this objection in several ways. An important presumption of the argument for the affirmative marketing device is that residential integration, with its attendant benefits to both blacks and whites, would be best promoted by officially recognizing racial succession as a fact of metropolitan life, whatever the underlying attitudes and motivations.97 Similarly, the increase in racial cooperation and understanding that often accompanies interracial living patterns98 arguably offsets any bolstering of racist beliefs that might attend government recognition of those beliefs. Indeed, the harmful stigmatization that may result from an affirmative marketing device is slight compared to the stigmatizing effect produced both by residential segregation itself and by the process of residential resegregation. Finally, the local fair-housing agencies that would likely be responsible for implementing the affirmative marketing device are normally engaged in pro-civil rights activities, an engagement that belies any official “approval” of the racial fears that produce white flight.99

Conclusion

The stable, integrated neighborhood is an important means of promoting racial harmony in America. Unfortunately, such communities are uncommon because of widespread neighborhood racial transition. This Note proposes an affirmative marketing plan for housing in transitional neighborhoods in order to curb that tipping process. The proposed plan, because it is a race-conscious device, necessitates facing facts with both eyes open. Reverse steering recognizes race and racism alike. It does so, however, in a way that achieves racial equilibrium in the local community without creating undue and unconstitutional racial stigma.

97. See A. Bickel, The Least Dangerous Branch 60-61 (1962) (housing quotas pursue end of residential integration in hope that racial prejudices may be eradicated).
98. See E. Grier & G. Grier, supra note 5, at 194-218 (describing positive attitudes of people living in stable integrated communities).
99. Fair-housing agencies are often set up pursuant to state laws, with the purpose of promoting the enforcement of fair-housing practices against local real estate brokers. See J. Wunker, W. Scott, D. DeMarco, & D. Onderdonk, supra note 19, at 10.1.