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Thompson v. HUD: Groundbreaking Housing Desegregation Litigation, and the Significant Task Ahead of Achieving an Effective Desegregation Remedy Without Engendering New Social Harms

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THOMPSON V. HUD: GROUNDBREAKING HOUSING DESEGREGATION LITIGATION, AND THE SIGNIFICANT TASK AHEAD OF ACHIEVING AN EFFECTIVE DESEGREGATION REMEDY WITHOUT ENGENDERING NEW SOCIAL HARMS

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"Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region. . . ."
-Judge Marvin J. Garbis, United States District Judge

I. INTRODUCTION

Housing desegregation litigation in the United States is currently marked by a tension between the state's interest in reversing the effects of intentional racial discrimination in housing and the process of securing the means best tailored for doing so. The Fourth Circuit has continued to grapple with this problem for more than a decade in its continuing review of *Thompson v. HUD*.[1] In the 1995 *Thompson* decision, the court considered whether the United States. Department of Housing and Urban Development (HUD) acted unlawfully by failing to work affirmatively to desegregate Baltimore City public housing following the prohibition of *de jure* segregation.[2] The action consisted of a class of African American plaintiffs, residents of Baltimore City public housing, who claimed discrimination on the basis of race.[3] The Plaintiffs' 1995 complaint contended that the Baltimore public housing system, established in the 1930's as a *de jure* segregated program, was yet to be desegregated by 1995 in violation of both Constitutional and statutory law. The parties entered into a 1996 consent decree whereby

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1. Thompson v. HUD, 348 F. Supp. 2d 398 (4th Cir. 1995).

2. *See e.g., Thompson*, 348 F. Supp. 398, 461 (D. Md. 2005) (Citing testimony indicating that 86% of all "hardscape" public housing units in Baltimore City, during the 1990's, were cited in Census tracts with African-American percentages above the citywide average in 1990, and that in 2002, within the public housing units, 98% of Baltimore's family tenants in public housing developments were African-American, and each public housing development on the whole was at least 91% African-American).

3. *See e.g.,* Thompson v. HUD, 2005 U.S. Dist. Lexis 294, 411 (D. Md. 2005) (defining the class as "all African-Americans who resided in Baltimore City family public housing units... between January 31, 1995 and June 25, 1996, who presently reside in Baltimore City family public housing units or who will in the future reside in Baltimore City family public housing units...").

HUD pledged to take affirmative steps to desegregate Baltimore's public housing stock. However, in April 2004, the Fourth Circuit held that HUD violated the terms of the consent decree and, in so doing, violated § 3608(e)(5) of the *Fair Housing Act.*

At the time of this writing, the United States District Court for the District of Maryland has yet to release its findings on the most appropriate remedial action to be taken. However, *Thompson*'s remedy phase highlights the epicenter of the current housing desegregation debate. A discernible line is drawn between plans to remedy the effects of urban racial housing segregation by the inclusion of court-ordered relocation of complainants to outlying suburban districts, as the Plaintiff class demands, and plans that do not include a suburban solution.

Section II of this paper outlines the specific procedural history and findings of the various stages of the *Thompson v. HUD* case. Section III provides the relevant legal background and precedent. Section IV presents a summary of the court's reasoning in *Thompson v. HUD.* Section V. is an analysis finding that if the District Court of the District of Maryland decides to adopt a *Gautreaux* [4] styled remedy – providing a court-ordered relocation of residents of Baltimore City housing projects to the outlying suburbs- it is likely to create new social harms in the suburbs such as (1) significant employment barriers to former public housing residents, (2) an overall lack of social capital for movers once they arrive in the suburbs, (3) increased transportation costs, and (4) conflict with "not in my backyard" attitudes. This paper concludes that for the *Thompson v. HUD* remedy to be effective it must include more than just a mobility program, it must also serve to require the investment of resources in developing affordable housing in mixed income developments inside the city, for instance, through inclusionary zoning.

II. THE CASE

A. Facts and Procedural History

The *Thompson* plaintiffs' 1995 complaint contended that well after the prohibition of segregation in public schools and facilities and the passage of several important laws banning segregation and discrimination in housing,[5] Baltimore had yet to desegregate its public housing stock in violation of both the Constitution and applicable sta-

4. Hills v. Gautreaux, 425 U.S. 284 (1976).

5. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Brown v. Board of Education II, 349 U.S. 294; 42 U.S.C. 2000(d); 42 U.S.C. § 3601.

tutory law. Plaintiffs claimed, on the one hand, that HUD exclusively assigned Baltimore's white public housing applicants to what were formerly *de jure* segregated "white housing projects," and on the other hand assigned black applicants to formerly *de jure* segregated "black housing projects," keeping the two populations of low-income tenants in largely separate Baltimore neighborhoods with disparate resources and opportunities. The complaint also alleged that many of the original "black housing projects" faced demolition and that almost all of the sites expected to be developed for replacement housing were located in minority neighborhoods with large concentrations of low-income housing, also within Baltimore City limits.[6]

The action was initially resolved by a 1996 consent decree agreement between the parties which called for 3,000 new housing opportunities for public housing residents along with the distribution of new housing vouchers for residents to move to higher-income areas.[7] However, in April 2004, the Fourth Circuit held that HUD violated § 3608(e)(5) of the *Fair Housing Act* by failing to consider "regional approaches" to eliminating racial segregation in Baltimore public housing, thereby failing to meet the requirements of the consent decree.[8]

Section 3608(e)(5) of the *Fair Housing Act* requires HUD to "administer [housing] programs . . . in a manner affirmatively to further the policies of the [Fair Housing] Act [and] these policies include the provision of housing free from discrimination."[9] The Fourth Circuit found that HUD failed to consider regional approaches in desegregation policies even though "Baltimore City is contiguous to, and linked by public transportation and roads to, Baltimore and Anne Arundel Counties and in close proximity to other counties in the Bal-

6. *Thompson*, 348 F. Supp. 2d at 398, 461 (n. 119) (D. Md. 2005) (stating that the demolished sites were Lexington Terrace (677 units), Fairfield (300 units), Flag House (487 units), Lafayette Courts (816 units), The Broadway (429 units), Hollander Ridge (1,000 units), Murphy Homes (758 units), Spencer Gardens (20 units), and Julian Gardens (23 units) many of which were replaced by lower density housing on virtually the same sites, without one to one replacement of units).

7. *See* AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, THE CASE OF *THOMPSON V. HUD*: A BRIEFING ON SEGREGATION AND PUBLIC HOUSING IN BALTIMORE, http://www.aclu-md.org/aTop%20Issues/Fair%20housing/ThompsonBriefing.pdf (last visited April 24, 2008).

8. *See Thompson*, 348 F. Supp. 2d at 408 (stating that "Baltimore City contains only approximately 30% of the Baltimore Region's households [and further] in 1940, 19 percent of the population of Baltimore City was African-American [but] by 2000, the population of Baltimore City was 64 percent African-American, while the population of the rest of the Baltimore Region was 15 percent Black" and finding that to *affirmatively* promote fair housing HUD must consider public housing opportunities outside of the city-limits).

9. *Id.*

timore Region."[10] The court characterized HUD's failure to utilize outlying suburban areas, vital components of the Baltimore housing market, for low-income and public housing to be "an abuse of discretion" most like "effectively wearing blinders that limited [its] vision beyond Baltimore City."[11] The court found that wearing such "blinders" in effect amounted to failure to fulfill the mandate of *Section* 3608(e)(5).

In January 2006, *Thompson* was submitted to a remedy phase in the United States District Court, where defendant HUD filed a motion for summary judgment arguing that the court erred in finding it liable.[12] Even if it was liable, HUD also argued, there was no possible remedial action for the court to take.[13] Judge Marvin Garbis of the United States District Court for the District of Maryland denied the motion for summary judgment, finding the defendant still liable, and finding remedial action still appropriate. Plaintiffs' counsel submitted a brief entitled "Plaintiff's Proposed Remedial Order" asking the court to order a multifaceted remedial plan, the crux of which is to desegregate Baltimore's public housing by allowing public housing residents to move to various designated outlying suburban areas under the court's supervision. At present, the United States District Court for the District of Maryland has yet to release its findings on the most appropriate remedial action to be taken.

B. Plaintiffs' Proposed Remedy

The Plaintiffs' proposed remedy includes provisions for the implementation of new fair housing review and monitoring standards.[14] Further, the plan asks for the use of remedial vouchers in "Communities of Opportunity" or those census tracts in the Baltimore Housing Market identified as "high" or "very high" opportunity areas.[15] Plaintiff's proposed remedy stipulates that no fewer than half of all rental housing units developed with investment of federal re-

10. *Thompson*, 348 F. Supp. 2d at 409.

11. *Id.*

12. *Thompson*, 2006 U.S. Dist. Lexis 9416 (D. Md. 2006).

13. *Id.*

14. *See* "Plaintiff's Proposed Remedial Order," Civil Action No. MJG095-309, 22 (D. Md. 2006) (recommending such new standards as the achievement of a minimum number of vouchers placed in specified communities, a mandated diversity of locations for the use of such vouchers, an accounting of the effectiveness of housing search assistance, and recording of the duration of residency for those who place vouchers).

15. *See* "Plaintiff's Proposed Remedial Order," Civil Action No. MJG095-309, 1 (D. Md. 2006) (defining areas as "high opportunity" based on such criteria as "economic, educational, and neighborhood health indicators" and to be reviewed for accuracy every two years).

sources be located in these so-called Communities of Opportunity and be affordable to families at or below 30 percent of median family income, with only a few narrowly drawn exceptions. This provision is significant in that it asks the court to order that at least half of all federally subsidized units be located in traditionally "all-white" Baltimore suburban areas, places that formerly existed virtually without the presence of any public housing whatsoever, and, further, it mandates that such units be affordable to low-income families.[16] Additionally, the proposed remedy demands that HUD "shall not approve" any plans for demolition of public housing in the Baltimore Region to reduce the number of affordable (or assisted) housing in Communities of Opportunity unless the reduction is offset by a one-to-one replacement of such units.[17] Presumably, this provision was intended to avoid the significant loss of affordable, low-income units that took place in Baltimore during numerous demolitions of public housing developments where replacement strategies were not in place.[18]

To achieve the administration of this "mobility program" – or the moving of the Plaintiff class from highly segregated city public housing units to the suburbs - the proposed remedial plan asks for vouchers to be administered by a "Regional Administrator," or coordinator of the "Regional Mobility Program."[19] Through such a program, HUD "shall" work with local Public Housing Authorities ("PHA's") to arrange the placement of plaintiffs in housing units in Communities of Opportunity.* To avoid replicating the segregation of Baltimore City in the suburbs, the Regional Administrator is given the task of prohibiting referrals of plaintiffs to housing units where more than twenty percent of the units in any one apartment complex or development are leased by Housing Choice Voucher holders.[20] Additionally, the Regional Administrator is tasked with taking into account such factors as (1) the number of children in the local school receiving "free and reduced meals," and (2) whether in the particular Community of Oppor-

16. *See e.g., Thompson*, 348 F. Supp. 2d at 460 (stating that "during the 1990's, 89% of public housing units developed with HUD's support in the Baltimore Region were in Baltimore City [and] in sharp contrast, none at all was sited in contiguous Baltimore County").

17. *See* "Plaintiff's Proposed Remedial Order," *supra* note 14 at 11.

18. *See supra* note 4.

19. *See* "Plaintiff's Proposed Remedial Order," *supra* note 14 at 23 (explaining that the value of the vouchers, which are to be used as the primary form of payment in renting a housing unit in a non-segregated region, are to be determined by deliberations between the Public Housing Authority and the Regional Administrator).

20. Housing Choice Voucher Program (HCVP), a federally subsidized tenant assistance program, was formerly referred to as "Section 8 housing" because the program derived from Section 8 of the Housing and Community Development Act of 1974 (codified as 42 U.S.C. § 5309 (2006)).

tunity under consideration, the African-American population is already above the average for the region, or if the particular community is receiving a disproportionate number of placements through the program.[21]

Finally, the Plaintiff's proposed remedy asks for the Court to procure a "Mobility Counselor" to provide counseling to persons seeking to use vouchers in suburban opportunity areas. Plaintiff class families are not obliged to participate in the program, however, if they do, they may still remain on other public housing waiting lists.[22] The counseling includes outreach to the Plaintiff families, outreach and recruitment of landlords, owners, and developers of housing units, outreach to community organizations, and housing search assistance to the Plaintiff families, and intensive post-move counseling.[23]

The core demand of the Plaintiff's Proposed Remedial Order is the use of 9,000 housing opportunities in Communities of Opportunity at a rate of 900 per year for ten years. Under the proposed plan, HUD is given credit toward the 9,000 unit goal with each placement of a member of the plaintiff class in a Community of Opportunity.[24]

III. LEGAL BACKGROUND

A. Prohibition of Racial Segregation in Housing

Even though specific statutory standards expressly prohibiting discrimination in federally assisted housing have been in place for more than forty years, racial discrimination and segregation in such programs is still pervasive in twenty-first century America.[25] There are three main legal protections against housing discrimination in place in the United States, and they are discussed below: (1) constitutional protection, (2) the Civil Rights Act of 1964, and (3) the Civil Rights Act of 1968.

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21. "Plaintiff's Proposed Remedial Order," Civil Action No. MJG095-309, 17 (D. Md. 2006).

22. "Plaintiff's Proposed Remedial Order," Civil Action No. MJG095-309, 18 (D. Md. 2006).

23. *Id.* at 20.

24. *Id.* at 13.

25. *See e.g.,* Florence Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L. J. 913, 915 (2005) (stating that "the 2000 Housing Discrimination Study showed continuing, substantial discrimination against Blacks and Hispanics in the rental and sale of housing and the 2000 Census demonstrated that if it continued to decline at the same rate, it would be decades before a moderate level of segregation were reached.").

1. Constitutional Protection

The Fifth Amendment guarantee of the United States Constitution establishes an obligation on the part of the federal government to further housing free from discrimination.[26] In *Bolling v. Sharpe*,[27] the Court found that just as racial segregation in state-sponsored public schools was found unconstitutional pursuant to the Equal Protection Clause of the Fourteenth Amendment,[28] racially-segregated public schools in the District of Columbia, a federal jurisdiction, was a violation of the Due Process Clause of the Fifth Amendment.[29] Thus, the United States Constitution forbids the federal government from intentionally contributing to racial segregation, a practice found to be inherently discriminatory.

These constitutional protections apply to the housing context as well. To be afforded Constitutional protection in the housing segregation context, a plaintiff must prove not only that segregation exists in public housing, but that the segregation is the result of purposeful discrimination on the part of the defendant. For instance, in *Village of Arlington Heights*, where a non-profit developer sought to build low-income housing on a fifteen acre parcel of land within a village and a local zoning board denied his petition for re-zoning, the denial of re-zoning failed to be found unconstitutional because it lacked a requisite "discriminatory purpose" in addition to proof of disparate impact.[30]

2. The 1964 Civil Rights Act

Despite the court-ordered desegregation of public schools and the widespread acceptance that segregation in public education is unconstitutional, segregation in federally assisted housing has persisted into the present day.[31] In the past, many of the statutory protections passed to prevent racial discrimination, in addition to constitutional protection, were without teeth when applied to the public housing context. For instance, Title VI of the 1964 Civil Rights Act was passed into law to provide that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participa-

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26. U.S. CONST. amend. V.

27. 347 U.S. 497, 500 (1954).

28. U.S. CONST. amend. XIV. *See also* Brown v. Bd. of Education, 349 U.S. 294 (1955).

29. U.S. CONST. amend. V.

30. *Village of Arlington Heights*, 429 U.S. 252 (1977). According to BLACK'S LAW DICTIONARY (8th Ed. 2004) disparate impact constitutes "the adverse effect of a facially neutral practice that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability," thereby making discriminatory intent irrelevant in a disparate-impact claim.

31. *See supra*, note 21.

tion in, be denied the benefits of, or be subjected to discrimination under any program . . . receiving Federal financial assistance."[32] However, as noted by Professor Florence Roisman, the Act excluded from the definition of "federal financial assistance" a "contract of insurance or guaranty" where the Federal Housing Administration (FHA)[33] and Veterans Administration (VA) housing programs operated on the basis of insured and guaranteed home loans, respectively.[34] Thus, housing secured through the FHA or VA were not covered by the Act. Additionally, the Act failed to address explicitly the correction of past discrimination or segregation when most federally assisted housing units remained segregated as remnants of an extensive past of *de jure* segregation in federally assisted housing. The 1977 Interagency Survey of HUD Title VI enforcement revealed neglect in HUD's performance in preventing segregation in public housing, citing HUD for failing to develop an effective Title VI review program, failure to remedy known civil rights violations, and a tenant assignment plan that did nothing to eliminate the vestiges of segregation.[35] Nevertheless, several notable cases found HUD liable under Title VI for the perpetuation of discrimination in federally assisted housing.[36]

3. The "Fair Housing Act"

Statutory protections from housing discrimination and segregation became more stringent with the passage of Title VIII of the 1968 Civil Rights Act ("The Fair Housing Act").[37] Even though the Supreme Court ruled that proof of intentional discrimination was required to establish a violation of the 1866 Civil Rights Act, Title VI of the 1964 Civil Rights Act, and the Constitution,[38] the Court has allowed the requirement of disparate impact, alone, to stand for proof of unconstitutional discrimination pursuant to Title VIII of the 1968 Civil

32. "1964 Civil Rights Act," Pub. L. No. 88-352, Title VI, 78 Stat. 252 (codified as amended at 42 U.S.C. 2000d (2004)).

33. Federal agency that preceded HUD.

34. Florence Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 How. L. J. 913, n.1 (2005).

35. Young v. Pierce, 628 F. Supp. 1037, 1047 (E.D. Tex. 1985).

36. *See e.g.*, Hicks v. Weaver, 302 F. Supp. 619 (1969) (finding HUD liable for perpetuating segregation in federally assisted housing in Bogalusa, Louisiana in violation of § 601 of the Civil Rights Act of 1964); Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970) (establishing that HUD violated the Civil Rights Act of 1964 by attempting to place a concentrated development of federally assisted housing in a mostly black, low-income neighborhood of Philadelphia).

37. 42 U.S.C. § 3601

38. *Village of Arlington Heights*, 429 U.S. 252 (1977).

Rights Act.[39] The Act prohibits segregation as well as discrimination in housing by creating an affirmative duty for HUD to eradicate such problems. Section 3608(e)(5) of the Act requires that HUD "administer [housing] programs . . . in a manner affirmatively to further the policies of this subchapter," and among these policies is the policy "to provide, within constitutional limits, for fair housing throughout the United States."[40]

In *N.A.A.C.P. v. HUD*, Justice Breyer recognized that Section 3608(e)(5) confers more than a duty upon HUD to refrain from segregation, but, rather, an affirmative obligation to provide integrated housing and to prevent segregation.[41] As stated in *Otero v. NYHA*, "action must be taken [by HUD] to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation."[42] In *N.A.A.C.P. v. HUD*, Breyer acknowledged that the affirmative duty to eradicate segregation "may be difficult to apply to borderline instances," but he insisted, "a court should be able to ascertain a clear failure to live up to the instruction over time."[43] *N.A.A.C.P. v. HUD* establishes a standard for monitoring HUD's affirmative obligation: requiring an evaluation of whether HUD has furthered fair housing, and if not, a solid explanation of why not and whether such a failure constitutes a violation of the statute.[44]

Numerous courts confronted the failure of HUD to meet its affirmative obligation to further fair housing following the adoption of Title VIII. In 1970, the Third Circuit enjoined HUD from acting to change a proposed housing project in Philadelphia from the originally contemplated owner occupied buildings to 100 percent rent supplement assistance akin to what is commonly recognized as "public housing."[45] The Third Circuit held that HUD was vested with broad discretion to supervise its various programs, but its discretion must adhere to the framework of the national policy against discrimination in federally assisted housing and in favor of affirmatively promoting fair hous-

39. Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (per curiam).

40. 42 U.S.C. § 3601 (2003). "Fair housing" under § 3601 means the elimination of discrimination in the sale or rental of housing according to the legislative history. *See* Cong. Rec. 4975 (Mar. 4, 1968).

41. N.A.A.C.P. v. HUD, 817 F. 2d 149, 155 (1987).

42. Otero v. New York Housing Authority, 484 F.2d 1122, 1134 (3rd Cir. 1970).

43. *N.A.A.C.P.*, 817 F. 2d at 158.

44. *Id. at* 158 (stating the standard as requiring "[a] straightforward evaluation of whether agency activity over time has furthered [fair housing], and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory.").

45. Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970).

ing.[46] The court found that the proposed conversion would serve to further segregation, harming the federal government's interest in fair housing.

HUD was also held liable for creating and perpetuating segregated public housing in East Texas, as the United States Court of Appeals for the Eastern District of Texas found that HUD had knowingly created and funded racially segregated housing in thirty-six counties in violation of the Constitution, the Civil Rights Act of 1866, Title VI of the Civil Rights Act of 1964, and its affirmative obligation under Title VII of the Civil Rights Act of 1968.[47]

In 1971 in *Gautreaux v. Romney*, the Seventh Circuit found HUD liable for assisting and carrying on racially discriminatory and segregated public housing within Chicago.[48] Evidence indicated that HUD knowingly allowed the racial segregation of federally assisted housing units even though it made some "good faith" efforts to try to seek non-segregated facilities.

HUD's failure affirmatively to further fair housing has caused courts to mandate remedial measures to correct segregation.

B. Creation Of Court-Ordered Remedial Regimes

Court-ordered remedial measures have become an essential element of the landscape of de-segregation in federally assisted housing. Remedying segregation has raised the particular question for courts of whether it is appropriate to include outlying districts as part of a court-ordered solution to intentional racial discrimination, especially when such discrimination is only evident inside a particular municipality. The Court established in the school desegregation cases, as in *Swann v. Charlotte-Mecklenburg Bd. of Education*, that the nature of the discriminatory violation determines the scope of the remedy.[49] In *Milliken v. Bradley*, a court-ordered remedial plan that included outlying suburban districts was found unconstitutional because the outlying areas had not participated in the complained of intentional racial discrimination, and their inclusion in the remedial plan would have greatly disrupted the governance of autonomous suburban school entities.[50] However, the *Milliken* decision is distinguished by courts in the housing desegregation context.

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46. *Id.* at 819.
47. Young v. Pierce, 628 F. Supp. 1037 (E.D. Tex. 1985).
48. Gautreaux v. Romney, 448 F. 2d 731 pinpoint (7th Cir. 1971).
49. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).
50. Milliken v. Bradley, 418 U.S. 717 pinpoint (1974).

1. Gautreaux and Metropolitan Area Remedies

In significant contrast to school desegregation, implementing a "regional approach" as part of a remedial plan to desegregate federally assisted housing has been found to be a remedy well-tailored to the violation and constitutional. For instance, in *Hills v. Gautreaux*, the plaintiff class, black tenants and applicants for public housing in Chicago, filed actions against HUD alleging intentional racial discrimination based on the placement of public housing in racially segregated neighborhoods.[51] The Court found HUD to have violated the Constitution and § 601 of the Civil Rights Act of 1964 by knowingly allowing racially segregated public housing.[52] The district court denied the plaintiff class' motion to consider metropolitan area relief as an effective remedy for the racially segregated public housing.[53] Instead, the court of appeals reversed and remanded the decision for the adoption of a comprehensive metropolitan area plan.[54] The Supreme Court granted certiorari to determine if the district court could order HUD to take remedial action outside the Chicago city limits.

The Court distinguished *Milliken* in holding that a judicial order directing relief beyond Chicago's boundaries did not entail coercion of uninvolved governmental units – as in *Milliken* - because HUD, as a government agency, (1) had the authority to operate outside of Chicago's city limits and (2) had clearly violated the Constitution.[55] The Supreme Court reasoned that a metropolitan area remedy was in no way impermissible as a matter of law in this instance because, unlike in *Milliken*, this case did not require "restructuring the operation of local government entities."[56]

Instead, the Court in *Gautreaux* called for deference to the district court to correct a constitutional violation by means which would in no way transgress the power of any suburban government entity. The Supreme Court cited a seminal school desegregation case in laying down the scope of court-ordered remedial power. The Court reasoned that the scope of an equitable remedy may be sufficiently broad to redress a right proven to be violated: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in

51. Hills v. Gautreaux, 425 U.S. 284 pinpoint (1976).
52. Gautreaux v. Romney, 448 F. 2d 731 pinpoint (7th Cir. 1971).
53. Gautreaux v. Romney, 363 F. Supp. 690 ponpoint (N.D. Ill. 1973).
54. Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 935-936 (7th Cir. 1974).
55. Hills v. Gautreaux, 425 U.S. at 297.
56. *Id.* at 296-297.

equitable remedies."[57] The district court later ordered relief in the form of 7,100 "Section 8" housing vouchers to be used by members of the plaintiff class in neighborhoods that were less than thirty percent African-American.[58]

2. Other Gautreaux- inspired Programs

Hills v. Gautreaux sparked a great national interest in the utilization of surrounding suburban districts for the elimination of urban housing segregation. For instance, the Clinton Administration, alongside then Secretary of HUD Henry Cisneros, attempted to conduct a national program of the *Gautreaux* sort – the "Moving to Opportunity for Fair Housing" demonstration project - placing heavy emphasis upon housing mobility in five major cities: Baltimore, Boston, Chicago, Los Angeles, and New York.[59] In these cities, residents of low-income housing received "Section 8" rental assistance vouchers to be used in designated areas with less than ten percent poverty, as authorized by federal law for ten years.[60]

Additionally, the federal HOPE VI program, launched in 1992, was created to lessen high concentrations of the urban poor living in severely distressed public housing projects, and to replace such housing with mixed-income developments. By 2004, nearly 63,100 severely distressed units were demolished and another 20,300 units slated for redevelopment pursuant to the HOPE VI program.[61] Even though HOPE VI was designed to desegregate and de-concentrate centers of urban poverty, many have criticized the program for its mixed results, and the widespread demolition of public housing units without a one to one replacement with alternative affordable housing units.[62] By and large, the housing desegregation debate has been indelibly changed by the *Gautreaux* styled remedy, and the Supreme Court's acknowledgement that, unlike in the school desegregation context, the desegrega-

57. *Id.* at 297 (quoting *Swann*, 402 U.S. at 15).

58. Susan J. Popkin et al., *The Gautreaux Legacy: What Might Mixed-Income and Dispersal Strategies Mean for the Poorest Public Housing Tenants?*, 11 HOUSING POLICY DEBATE 911, 912.

59. Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 152, 106 Stat. 3716, 3716-3717(1992).

60. *See* United States Dep't. of Hous. and Urban Dev., Moving to Opportunity for Fair Housing, http://www.hud.gov/progdesc/mto.cfm (last updated Dec. 5, 2000).

61. MARGERY AUSTIN TURNER & KALE WILLIAMS, HOUSING MOBILITY: REALIZING THE PROMISE, REPORT FROM THE SECOND NATIONAL CONFERENCE ON ASSISTED HOUSING MOBILITY, Urban Institute (1998).

62. *Id.* at 37-38.

tion of federally assisted housing may include outlying suburban portions of a metropolitan area housing market.

IV. LEGAL REASONING

In the liability phase of the *Thompson v. HUD* proceedings, the Fourth Circuit explored, among other issues, the plaintiff class' three primary claims: violation of, (1) the United States Constitution, (2) Title VI of the Civil Rights Act of 1964, and (3) Title VIII of the Civil Rights Act of 1968.

In exploring the Plaintiffs' constitutional claim, the Fourth Circuit considered whether HUD violated the Equal Protection guarantee of the Fifth Amendment by casting distinctions on the basis of race in its siting decisions for federally assisted housing.[63] The Court found that if the plaintiff class could further "prove that Defendants failed to treat the victims of past racial discrimination as required" by law,[64] or could prove that HUD possessed the requisite intent to discriminate,[65] then Equal Protection liability would likely be established. In this way, the Court reserved the constitutional issue for the "remedial phase" of the trial where the issue of intent would be more thoroughly examined.[66]

The Fourth Circuit found the plaintiff's Title VI claim,[67] based on the prohibition of race-based discrimination in federally funded programs, could not stand for procedural reasons. The Court found that the plaintiffs did not have a direct right of action against a federal defendant pursuant to the Administrative Procedure Act[68] and Title VI.[69]

As for the plaintiffs' Title VIII ("Fair Housing Act") claim, the court found that HUD violated its statutory duty affirmatively to further fair housing pursuant to Section 3608(e)(5),[70] and the Fourth Circuit emphasized that this abdication derived mainly from HUD's failure to consider regional solutions to Baltimore City's housing

63. *Thompson*, 348 F. Supp. 2d 398, 411 (D. Md. 2005).

64. *See e.g.*, Brown v. Board of Education II, 349 U.S. 294, 299-300 (establishing that purposeful discrimination of a continuing nature may impose an affirmative obligation onto government actors to remedy past wrongs). Cite to your case, "citing Brown."

65. *See, e.g.*, Washington v. Davis, 426 U.S. 229 pincite needed (1976).

66. *Thompson*, 348 F. Supp. 2d at 451.

67. 42 U.S.C. § 2000d (2003).

68. 5 U.S.C. § 701 (1966).

69. *Thompson*, 348 F. Supp. 2d at 423.

70. 42 U.S.C. § 3601, 3608 (e) (5) (2003).

segregation problem.[71] The court reasoned that even though the Fair Housing Act does not mandate specific remedial measures necessary to effect desegregation, the law does impose a high standard for the government, disallowing the maintenance and perpetuation of the status quo ante when segregation exists.[72]

The Fourth Circuit concluded by reemphasizing its finding of statutory violation and noting that "the case shall proceed to the remedial trial phase pursuant to the decision herein."[73]

V. ANALYSIS

Undoubtedly, the *Thompson* decision embodies great promise for the future enforcement of federal statutory law in the pursuit of fair housing. However, the power of the *Thompson* decision to reverse racial discrimination in Baltimore public housing is dependent upon the district court's pending remedial decision, and the effectiveness of that decision. The plaintiff's proposed plan - a *Gautreaux*-styled remedy,[74] likely will serve to desegregate Baltimore city, however, it is also likely to create new social harms in the suburbs, merely shifting some of the problems endemic to poverty from one place to another. Among the new harms likely will be (1) significant employment barriers to former public housing residents in the suburbs, (2) an overall lack of social capital for movers once they arrive in the suburbs, (3) an increased cost of living and increased transportation costs, (4) and conflict with "not in my backyard" attitudes.

A. Employment Barriers

Evidence indicates that mobility programs have little positive impact on movers' employment situations. Most notably, Kirschenman and Neckerman found that when searching for suburban employment "if an individual is African American, has a low income, and is from the inner city, or is perceived as such, these characteristics severely hinder the person's employment chances."[75] A 2005 study of the

71. *See e.g., Thompson*, 348 F. Supp. 2d at 459 (stating, "It is simply inadequate to try to solve the problem by redistributing the population of Baltimore City within the city limits).

72. *See e.g., Thompson*, 348 F. Supp. 2d at 457 (discussing the affirmative statutory obligation to promote fair housing or housing free from discrimination).

73. *Thompson*, 348 F. Supp. 2d at 524.

74. *See supra*, note 13.

75. Joanna M. Reed et al., *Voucher Use, Labor Force Participation, and Life Priorities: Findings From the Gautreaux Two Housing Mobility Study*, 8 CITYSCAPE 219, 221 (2005) (describing Joleen Kirschenman & Kathryn Neckerman, *We'd Love to Hire Them But . . . The*

"*Gautreaux Two*" housing mobility experiment,[76] a successor to the original court-ordered *Gautreaux* project, found that only seven percent of movers started new jobs in their new neighborhoods following their move to "areas of opportunity" from Chicago public housing projects.[77] In fact, thirty-six percent of movers maintained their jobs, childcare arrangements, and social networks that they possessed in their old neighborhoods,[78] and thirty-six percent of movers did not work at all because of severe personal and health problems.[79]

Raphael, Stoll, and Holzer found that even black suburban employers were less likely to employ low-income, suburban black applicants than were central-city black employers even though "educational attainment is positively correlated with suburban residences . . . among blacks."[80] In a seminal assessment of the effectiveness of the *Gautreaux* mobility program, Popkin, Buron, Levy, and Cunningham conclude that, "rather than big economic changes, the research implies that the major benefit of mixed-income approaches for those public housing residents who are able to obtain units will be an improved quality of life in a substantially safer, better-maintained community."[81] However, the same authors go on to raise doubts about the sustainability of movers living in the "safer, better-maintained community," as movers are dependent upon positive relationships with private market landlords in order to keep their units.[82]

Additionally, Popkin et. al. suggest that private landlords are less likely to be sensitive to the problems confronted by former public housing tenants when they rent private market units to government issued voucher-holders – problems like mental illness, substance abuse, and the need to shelter non-nuclear family members.[83] The evidence indicates that movers in *Gautreaux*- style mobility programs experience small gains, if any, to labor market participation. Even though

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Meaning of Race for Employers, *in* THE URBAN UNDERCLASS (Christopher Jencks & Paul E. Peterson eds., The Brookings Institution, 1991).).

76. *Id.* at 222. The *Gautreaux Two Program* offered residents who were current public housing residents in Chicago, in good standing, to place their name on a list to receive vouchers that would enable them to move to certain designated "opportunity areas." The program defines "opportunity areas" as census tracts where the African-American population does not exceed 30 percent and only 24 percent of residents are living in poverty.

77. *Id.* at 233.

78. *Id.* at 230.

79. *Id.* at 232.

80. Steven Raphael et al., *Are Suburban Firms More Likely to Discriminate Against African-Americans?*, 48 JOURNAL OF URBAN ECONOMICS 3, 17 (Nov. 2000).

81. Popkin, *supra* note 58, at 935.

82. *Id.* at 934.

83. *Id.*

the *Thompson* plaintiffs' proposed plan attempts to provide "mobility counseling" to assist residents in securing, among other things, employment opportunities in the suburbs, there is little evidence that mobility counseling can help movers overcome the racial prejudices of suburban employers.

B. Lack of Social Capital and The Increased Cost of Transportation

Strong advocates of mobility programs argue that when access to suburban housing units is provided to low-income families, the families are likely to leverage the assistance of neighbors and suburban acquaintances to attain employment and other valued social resources. As Briggs argues, many people in underclass neighborhoods lack "social capital," or the assistance of neighbors with resources like college educations or powerful social networks, to assist them in their upward mobility.[84] However, some contend that there is little proof that introducing low-income residents to neighbors with resources contributes to their upward mobility. Specifically, Popkin asserts that there is no "strong evidence that exposing low-income public housing tenants to higher-income residents has any effect on their employment or educational outcomes."[85] In fact, research indicates that many public housing residents that re-locate to the suburbs continue to prefer, and go to great lengths to sustain, their old social networks in their former neighborhoods.[86] As a consequence, these particular participants pay increased costs for transportation back to the resources and networks with which they are most familiar.[87] Also, as mentioned above, the need for transportation back to a movers' original community may be born out of necessity because an individual cannot find a job in the suburbs due to employment discrimination, and shopping and conducting business in the suburbs is more expensive, forcing that person to continue to work and shop inside the city.[88] One of the challenges of twenty-first century housing policy will be to acknowledge and consider the valuable ties that low-income African-Americans make to

84. *See generally*, Xavier de Souza Briggs, *Moving Up versus Moving Out: Neighborhood Effects in Housing Mobility Programs*. 8 HOUSING POLICY DEBATE 195-234 (1997).

85. Popkin, *supra* note 58, at 928.

86. *See, e.g*, Reed, *supra* note 72, at 230 (discussing mobility program participants that prefer to continue to maintain jobs, childcare arrangements, and social networks from their original neighborhoods).

87. *See, e.g., id.* (citing the example of a former public housing resident in the *Gautreaux Two* housing study who had to buy a new car to make the commute back to her old neighborhood where she still works and shops).

88. *See supra*, Part V.(1).

survive in urban neighborhoods, and to incorporate this understanding into mobility programs.[89] Assigning a higher social value to middle or upper-class social networks than to networks of poor African-Americans seems to be a normative judgment that this author is unwilling to make.[90]

C. NIMBY Conflict

Suburban opposition to welcoming low-income neighbors into middle class neighborhoods, commonly characterized as the "Not in My Backyard" (NIMBY) effect, has been regarded by many as indicative of the prejudice and irrational bigotry of suburbanites. However, in an extremely narrow context, some scholars argue that NIMBYism represents the expression of logical fears on the part of middle class residents because a reduction in property prices is attributed to the presence of low-income tenants.[91]

Galster analyzed the persistent drop in property values when more than a critical mass of low-income voucher-holders relocated within the same vicinity.[92] Indeed, the *Thompson* plaintiffs' proposed remedial plan addresses this issue by appointing a Regional Administrator who is given the task of prohibiting referrals of plaintiffs to housing units where more than twenty percent of the units in any one apartment complex or development are leased by Housing Choice Voucher holders.[93] However, the *Thompson* proposed remedial plan states no requirements for the Regional Administrator to track the poverty concentration of the particular *neighborhood as a whole*,[94] but, rather, simply precludes resegregation in particular apartment com-

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89. *See, e.g.*, Sudhir Alladi Venkatesh, *We Must Acknowledge How Poor People Live*, POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 5-6 (stating, "the poor live in networks and households. These fluid ties, rooted in kind and the exchange of symbolic goods (e.g. intimacy) and commodities (babysitting), hold for white ethnics and Latinos as well as blacks. How to incorporate this variability in a voucher program? I'm not sure, but it would be nice if the leading minds would take it seriously.").

90. There are tremendous social benefits experienced by families in low-income housing who depend upon each other for babysitting, informal loans, transportation etc., all things unavailable to individuals away from their social network.

91. George Galster, *Making a Nationwide Gautreaux Program More "Neighborhood Friendly,"* POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 7 (citing WHY NOT IN MY BACKYARD?: NEIGHBORHOOD IMPACTS OF DECONCENTRATING ASSISTED HOUSING (George Galster, et al. eds., Rutgers Univ. Ctr. for Urban Policy Research 2003)(2003).).

92. *Id.*

93. *See supra*, note 18.

94. "Neighborhood" here indicates a unit much smaller than the census tract designated by the *Thompson* court as a "Community of Opportunity."

plexes. Galster contends that "the neighborhood level distribution of voucher holders" is the most essential ingredient to ensuring that resegregation does not occur in suburban territories.[95] The remedial plan must aim to prevent a reflexive white flight away from low-income residents in the suburbs, invoking a game of "musical chairs," in which the neighborhood effects of high concentrations of poverty are the same but for the fact that they would be experienced in a different place, the suburbs.

VI. CONCLUSION

Since the 1930's, federal housing programs have contributed to the creation and prevalence of Baltimore's racially segregated public housing stock. Living in a distressed community – one socially isolated, with a high concentration of poverty – is devastating to a family's access to opportunity, it bares significant negative mental and physical health effects, and it negatively affects the city's overall well-being.[96] In light of these facts, mobility programs are unquestionably beneficial to reversing the effects of housing discrimination and to ushering new resources to families in distressed communities. However, it is imperative that courts, and in particular the *Thompson* court, consider a remedial plan that will offer mobility as an option - but not the *only* option - for reversing racially segregated housing. In fact, it seems clear that *the most disadvantaged families* [97] may not fair well renting from private landlords in suburbs away from their informal support networks and jobs in the city, even with the support of "mobility counselors." Mobility should not be an "all or nothing" adventure for participants, a choice between remaining with the status quo ante – in a segregated urban neighborhood – or submitting one's family to an entirely new environment with new rules.

Instead, the *Thompson* court's remedial decision should, in addition to offering a mobility program, mandate a new regime of "inclu-

95. George Galster, *Making a Nationwide Gautreaux Program More "Neighborhood Friendly,"* POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 7.

96. *See, e.g.*, Margery Austin Turner and Dolores Acevedo-Garcia, *Why Housing Mobility?: The Research Evidence Today*, POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 2 (stating that "a considerable body of social science research finds evidence that living in profoundly poor or distressed neighborhoods can have a significant impact on people's well-being and longer-term life chances.")

97. For instance, like those that are severely disabled or mentally ill, and depend on the help and assistance of informal networks in their low-income community for their own survival.

sionary zoning" in Baltimore. [98] Inclusionary zoning relies on market forces to create more affordable housing units inside a city. IZ laws mandate that a specified percentage (usually ten or fifteen percent) of new housing development in a city must be affordable for low-income families.[99] Many IZ policies offer "density bonuses" allowing builders to put up more housing than the zoning laws usually permit, serving to lower the cost to the builder of the inclusionary unit.[100] To incorporate IZ principles into its remedial decision, the court should demand a Baltimore City "fair share" requirement,[101] and it should permit the Baltimore City Council to pass laws providing regulations for how best to meet that requirement.[102]

IZ will serve to complement and supplement the Plaintiff's proposed mobility program. IZ will enable those who are most disadvantaged, and less likely to meet the requirements of the mobility program, to live in a non-segregated, city dwelling. Further, IZ will help to keep "workforce housing" in Baltimore, so that those with service sector jobs necessary to the city's economy may reasonably afford to both live inside the city and apart from highly concentrated poor enclaves. And finally, inclusionary zoning will insure that Baltimore City continues to possess the racial diversity necessary to enrich the lives of its citizens, and to remain competitive with other United States cities of comparable size.

The *Thompson* court must recognize that the scope of the complained of discrimination requires a remedy that functions creatively to attack segregation from all angles. By July 2006, there were 39,315 units of assisted rental housing in Baltimore,[103] however, the plaintiff class, composed of some 14,000 public housing residents, proposes the creation of just 900 housing opportunities per year for ten years.[104] That is not to mention that voucher-holders likely will confront discrimination from private landlords in the free market, as there seems yet to be a federal fair housing law banning "source of income" dis-

98. David Rusk, *Inclusionary Zoning – Gautreaux by Another Pathway*, POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 9.

99. *Id.* Over 135 county and city governments have enacted mandatory inclusionary zoning laws since 1973. *Id.*

100. *Id.*

101. A "fair share" meaning a specified percentage of new housing set-aside for low-income residents.

102. *See, e.g.*, S. Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (*Mount Laurel II*) (establishing a "fair share formula" to determine whether each municipality had met its obligation to provide affordable housing).

103. Baltimore City Task Force on Inclusionary Zoning, *At Home in Baltimore: A Plan for an Inclusive City of Neighborhoods* 7 (July 2006).

104. *See* "Plaintiff's Proposed Remedial Order," *supra* note 13.

crimination, and private market discrimination against voucher-holders is prevalent.[105]

Only time will tell how the *Thompson* remedial decision reads. However, for it to be effective, and not just an exemplar of costly, time-consuming, decade-spanning, litigation, it must consider the enormity of the problem, multiple means to attack that problem, and the specific needs and interests of the wronged plaintiff class that it seeks to serve. New social harms can be avoided by the Fourth Circuit upon the realization that mobility, although a salient solution, may not be for everyone.

105. Libby Perl, *Needed Element: Laws Prohibiting Source of Income Discrimination*, David Rusk, *Inclusionary Zoning – Gautreaux by Another Pathway*, POVERTY & RACE (Poverty & Race Research Action Counsel), January/February 2005, at 8.