Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors

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NOTE

OPENING THE DOOR TO RACE-BASED REAL ESTATE MARKETING: SOUTH-SUBURBAN HOUSING CENTER v. GREATER SOUTH SUBURBAN BOARD OF REALTORS

For our primary target we have chosen housing . . . . [W]e shall cease to be accomplices to a housing system of discrimination, segregation and degradation. We shall begin to act as if Chicago were an open city.

—Martin Luther King, Jr., July 10, 1966

INTRODUCTION

Despite Dr. King’s emphatic pronouncement over one quarter of a century ago, most communities in the Chicago metropolitan area have not responded in kind; the doors to integrated housing are often closed. Congress enacted the Fair Housing Act of 1968 with the dual purposes of ending discriminatory housing practices and promoting integrated housing. Enforcement of the Act’s specific prohibitions has successfully combatted many overtly discriminatory housing practices. However, pervasive, subtle discrimination still

2. John E. Farley, Segregation in 1980: How Segregated Are America’s Metropolitan Areas?, in DIVIDED NEIGHBORHOODS, CHANGING PATTERNS OF RACIAL SEGREGATION 100 (Gary A. Tobin ed., 1987) (hereinafter DIVIDED NEIGHBORHOODS) (stating that segregation levels in Chicago did not decline at all between 1970-1980); John F. Kain, Housing Market Discrimination and Black Suburbanization in the 1980s, in DIVIDED NEIGHBORHOODS, supra, at 68, 77 (noting intense segregation in the Chicago suburbs as of 1980; only 23 had black populations over 10%, and 162 had black populations under 3%). Nineteen-ninety census figures for the Chicago metropolitan area show that many communities have experienced growth in their minority populations. However, the largest increases were in suburbs that already had substantial minority populations. See Chicagoland Census Report (Cook County), CHI. TRIB., Feb. 13, 1991, § 1, at 8 (giving population breakdown by race of every Chicago metropolitan community for the years 1980 and 1990).
4. Gary A. Tobin, Preface to DIVIDED NEIGHBORHOODS, supra note 2, at 8 (stating that realtors rarely openly refuse to show blacks homes in certain neighborhoods, and that federally subsidized housing is no longer sanctioned to be racially segregated).
exists, and most open housing programs have not altered the racial prejudice that contributes to the segregative norm. The result is that integrated housing is often merely a transition from all-white segregation to all-black resegregation.5

In an effort to stem the resegregative trend in many communities, local governmental agencies and private open housing programs have embarked on a controversial course; they use race-conscious tactics to help promote the Fair Housing Act’s goal of achieving stable, integrated housing.6 Examples of these strategies include establishing racial quotas in certain housing projects or neighborhoods,7 establishing financial incentive programs that reward persons moving to areas where their race is underrepresented,8 and marketing properties in a way designed to attract potential customers of a race that is underrepresented in the community.9 These tactics have shown promise in maintaining integration, but opponents of these measures assert that the programs often discriminate against minorities by denying them housing or making it “otherwise unavailable” in violation of the Fair Housing Act.10

South-Suburban Housing Center v. Greater South Suburban Board of Realtors11 examines the legality of one such plan, in which a realtor made special marketing and advertising efforts to predominantly white audiences in an effort to attract them to properties that would otherwise primarily attract black customers. The decision by the Seventh Circuit in that case illustrates the difficulty courts have in analyzing the legality of race-conscious housing integration programs. South Suburban-Housing Center also addresses an issue of first impression—whether the responding actions of a real estate organization opposed to race-conscious programs are legal under the

5. Kermit J. Lind, Maintaining Residential Integration: Municipal Practices and Law, 31 CLEV. ST. L. REV. 603, 608 (1982) (stating that in the past, interracial neighborhoods were viewed not as a legitimate part of the system, but as an area in a state of pathological transition).
6. See infra notes 245-353 and accompanying text (discussing the legality of various race-conscious techniques used to achieve or maintain housing integration).
7. See infra notes 245-82 and accompanying text (discussing in detail the legal problems racial occupancy quotas create under the Fair Housing Act).
8. See infra notes 283-304 and accompanying text (discussing various pro-integration incentives and their legality under the Fair Housing Act).
9. See infra notes 305-53 and accompanying text (discussing the widely varying techniques of affirmative marketing and their legality under the Fair Housing Act).
10. See infra note 37 (discussing the § 3604(a) prohibition against practices that deny or make housing “otherwise unavailable” on the basis of race); infra notes 135, 312 (discussing accusations that race-conscious programs constitute reverse steering in violation of the Fair Housing Act).
Fair Housing Act. In particular, South-Suburban Housing Center addresses whether a realtor association that disagrees with race-conscious tactics on philosophical grounds may refuse to list properties marketed that way in its multiple listing service.

In South-Suburban Housing Center, the Seventh Circuit held that affirmative marketing of real estate, whereby a broker directs additional advertising towards one racially identifiable group in an effort to promote integration, does not violate the Fair Housing Act. It also held that private parties could not be compelled to adopt race conscious programs, and that a private party does not have to cooperate with the special outreach efforts of others. Thus, the Seventh Circuit concluded that a multiple listing service that philosophically disagreed with affirmative action programs could deny access to properties marketed that way.

This Note analyzes the Seventh Circuit's reasoning in support of its decision. The Note begins by reviewing the legal parameters governing the use of race-conscious housing programs under the Fair Housing Act, with an emphasis on affirmative action efforts within the Chicago metropolitan area. It also reviews the development of the Title VIII standard of review of challenged housing activities, which borrows heavily from Title VII precedent, and discusses how it has been applied to different types of race-conscious programs, both public and private. The Note then critically examines the Seventh Circuit's application of the standard of review to the facts of South-Suburban Housing Center, which involved private integration efforts.

Part III argues first that although the Seventh Circuit correctly concluded that the affirmative marketing plan was legal, it improperly characterized the challenge to the plan as involving a racial steering claim requiring analysis under an intentional discrimination standard only. The challenge to the affirmative marketing program spoke directly to its effect on the availability of the housing to potential minority customers, and thus required analysis under a discriminatory effect standard as well. The analysis develops a test for analyzing whether race-conscious marketing by a realtor has a racially discriminatory effect on the availability of housing information for potential customers. Second, Part III asserts that the Sev-
enth Circuit incorrectly concluded that the decision by a realtor board conducting a multiple listing service to adopt a color-blind marketing scheme allowed the board to deny access to the listing service to properties marketed in a race-conscious manner. The analysis argues that listing the property would not require a board to cooperate with race-conscious tactics in contravention of its philosophical ideals. Instead, denying access to the listing service constituted interference with housing rights in violation of the Fair Housing Act.

Finally, Part III focuses on the impact *South-Suburban Housing Center* will have on affirmative marketing efforts. This is the first federal appellate court decision to address the legality of affirmative real estate marketing programs under the Fair Housing Act. The Seventh Circuit's endorsement of these activities will likely spur their continued use, by both public and private entities. The Note asserts that *South-Suburban Housing Center* will also encourage additional use of other race-conscious tactics, especially pro-integration financial incentives. The Note finally posits that since *South-Suburban Housing Center* did not require one realtor to cooperate with another realtor's race-conscious efforts, the use of real estate agents in the affirmative marketing process will be curtailed. Instead, private affirmative marketing efforts will be largely implemented by non-profit groups that are not directly involved in the real estate transaction process.

### I. Background

#### A. Before the Fair Housing Act

A century of post-Civil War institutionalized racism created well-entrenched segregated housing patterns in the United States.  


As late as 1950, the National Association of Realtors (“NAR”) Code of Ethics stated that “[r]ealtors should not be instrumental in introducing into a neighborhood a character of property or occupancy, members of a race or nationality or any individual whose presence will clearly be detrimental to property values in the neighborhood.” *Fair Housing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 100th Cong., 2d Sess. 97* (1988) [hereinafter *Fair Housing Hearings*] (statement of Winston H. Richie, Director, East
Through the use of racial zoning and restrictive covenants during the first half of the twentieth century, black Americans were effectively blocked from access to most urban housing stock. The great numbers of blacks migrating to the North during the first half of the twentieth century were largely confined to narrow, intensely segregated tracts within the central city. Expansion of black housing

Suburban (Cleveland) Council for Open Communities).

16. SCHWEMM, supra note 15, §§ 2.2, 3.3-3.4, at 2-2 to 2-4, 3-4 to 3-11. The Supreme Court invalidated explicit racial zoning in Buchanan v. Warley, 245 U.S. 60 (1917) (invalidating an ordinance that prohibited whites or blacks from purchasing on any block in which they were a racial minority). Restrictive covenants subsequently sprung up en masse as a substitute means of blocking black access to all-white areas. CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 82 (Kennikat Press 1971) (1955). Restrictive covenants were particularly widespread in Chicago, and received the explicit approval of the Federal Housing Authority ("FHA"). Id. at 110. State court sanction of restrictive covenants led to the creation of "Neighborhood Improvement Associations," which mobilized opposition to minority entry under the guise of protecting the beauty and safety of the community. Id. at 181-90. At one time Chicago had nearly 100 of these associations, which enforced community loyalty by branding members who sold property to "undesirables" as enemies to be punished. Id. at 110, 187-88.

The Supreme Court invalidated enforcement of racially restrictive covenants in Shelley v. Kraemer, 334 U.S. 1 (1948), holding that the judicial enforcement by state courts of such restrictions was sufficient state action to trigger the protection of the Fourteenth Amendment's Equal Protection Clause. Id. at 28. However, Shelley did not prohibit voluntary adherence to racially restrictive covenants. Id. at 13. It was not until after the Fair Housing Act was passed that restrictive covenants were found illegal in and of themselves. Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (en banc).

Invalidating explicit methods of maintaining racial segregation did not end more subtle methods for achieving an identical result. Government land use zoning restrictions (particularly restrictions on multi-unit development) often had the economic effect of excluding blacks from certain communities. See infra notes 165-84 and accompanying text (discussing discriminatory effects analysis). Additionally, segregated housing was perpetuated by discriminatory private real estate practices, including racial steering, denying access to brokerage services, and intimidation. See infra notes 35-57 and accompanying text (discussing the Title VIII prohibitions against certain real estate practices).

17. See ABRAMS, supra note 16, at 9 (discussing how minorities were forced into the slums of the old city centers). Chicago is a good illustration of the black housing experience during the first half of the twentieth century. Chicago was not always segregated; in 1898 only 25% of Chicago's 30,000 blacks lived in neighborhoods with a black majority. Over 30% of the blacks lived in areas that were over 95% white. As late as 1910, blacks were less segregated from native whites than Italian immigrants. BERRY, supra note 1, at 3.

The move toward segregation began with the great black migration to the North, which began around 1915, fueled by the resurgence of the Ku Klux Klan in the South and wartime production needs. Id. at 3-4. Black migration increased even further from 1930 to 1950 as the curtailment of European immigration in the 1920s created a void in the labor market. ABRAMS, supra note 16, at 7. The black population in Chicago rose to 110,000 by 1920, and to over 509,000 by 1950. Id. at 26; BERRY, supra note 1, at 3. The confluence of white racial fears and prejudice, as institutionalized in Chicago real estate practices, effectively limited black housing choice and forced most to live in a narrow, one-half mile by five mile belt on the city's south side. Id. at 6, fig. 1-1. By 1950, 66.9% of blacks lived in areas that were over 90% black. Conversely, only 3% of whites lived areas that were over 50% black. By 1960, Chicago manifested the greatest degree of racial segregation among the eleven metropolitan areas with over 200,000 blacks. Id. at 4-5.
opportunities came mainly in the form of realtor "blockbusting" of adjacent white neighborhoods.\textsuperscript{18}

The push for federal legislation outlawing discrimination in housing began in 1954 with \textit{Brown v. Board of Education},\textsuperscript{19} where the Supreme Court redirected public policy by holding that officially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.\textsuperscript{20} The Executive Branch expanded on the constitutional protection against de jure segregation in 1962 when President Kennedy issued Executive Order 11,063.\textsuperscript{21} This order prohibited racial discrimination in federally financed housing.\textsuperscript{22} Congress then passed the Civil Rights Act of 1964,\textsuperscript{23} which prohibited racial discrimination in all public accommodations (Title II),\textsuperscript{24} in all federally financed programs (Title VI),\textsuperscript{25} and by public and private employers (Title VII).\textsuperscript{26}

Although all branches of the federal government supported the goal of ending segregation in society by the mid-1960s, their efforts were primarily directed at ending government-sponsored discrimination.\textsuperscript{27} Title VI did not expressly prohibit private discrimination in

\textsuperscript{18} Taeuber, \textit{supra} note 15, at 341-42; see also Lind, \textit{supra} note 5, at 608 (noting that in earlier days interracial neighborhoods were not regarded as a legitimate part of the social system, but were assumed to be in a state of pathological flux).

"Blockbusting" refers to realtor exploitations of racial tensions created when blacks move into a previously all-white neighborhood. Realtors make uninvited solicitations for listings, intimating that the neighborhood is undergoing or about to undergo a change in racial composition. This practice preys on the fears and prejudices of whites and is effective in stimulating sales (and realtor commissions) in racially transitional neighborhoods. Zuch v. Hussey, 394 F. Supp. 1028, 1049-50 (E.D. Mich. 1975), \textit{aff'd without opinion}, 547 F.2d 1168 (6th Cir. 1977). Blockbusting is expressly prohibited by the \textit{Fair Housing Act}. See 42 U.S.C. § 3604(e) (1988) (prohibiting, for profit, an attempt to induce any person to rent or sell a dwelling by representations regarding the entry or prospective entry of persons of a particular racial group); 24 C.F.R. § 100.85(c)(1) (1991) (associating a particular racial group with increased crime, lowered property values or decline in quality of schools or other community services is a prohibited representation).

\textsuperscript{19} 347 U.S. 483 (1954).

\textsuperscript{20} Id; see Pierre deVise, \textit{Housing Discrimination in the Chicago Metropolitan Area: The Legacy of the Brown Decision}, 34 DePaul L. Rev. 491, 492 (1985) (explaining that \textit{Brown} was "a major landmark and a turning point in American public policy").

\textsuperscript{21} 27 Fed. Reg. 11,527 (Nov. 20, 1962) (codified at 3 C.F.R. § 3604(e) (1988) (prohibiting, for profit, an attempt to induce any person to rent or sell a dwelling by representations regarding the entry or prospective entry of persons of a particular racial group)); 24 C.F.R. § 100.85(c)(1) (1991) (associating a particular racial group with increased crime, lowered property values or decline in quality of schools or other community services is a prohibited representation).

\textsuperscript{22} Id.


\textsuperscript{25} Id. § 2000(d).

\textsuperscript{26} Id. § 2000(c). Title VII employment discrimination precedents are universally applied when analyzing housing discrimination claims under the \textit{Fair Housing Act}. See \textit{infra} text accompanying notes 142-233 for a discussion of the Title VII/Title VIII analogy.

\textsuperscript{27} Only Title VII directly prohibited private discrimination, and only in the employment con-
housing, \(^28\) and courts had not interpreted the Civil Rights Act of 1866 to prohibit such discrimination either. \(^29\)

In 1966, President Johnson sponsored an unsuccessful federal legislative effort to prohibit discrimination in both the public and private housing markets. \(^30\) The Johnson Administration again sponsored similar legislation in 1967, but it was substantially altered by the House and not acted upon by the Senate. \(^31\) In 1968, Senator Mondale introduced what is known as the Fair Housing Act of 1968 (Title VIII). \(^32\) The Act was debated and quickly passed by both the Senate and the House, propelled by the assassination of Dr. Martin Luther King and the release of the Kerner Commission Report, which warned that racial segregation was an underlying cause of numerous urban civil disorders, and which recommended enacting comprehensive fair housing legislation. \(^33\) President Johnson signed

\[\text{text. 42 U.S.C. § 2000(e).} \]

\(^28\) Title VI is "impotent" with regard to the private housing market. \textit{James A. Kushner. Fair Housing: Discrimination in Real Estate, Community Development and Revitalization § 1.04 (1983).}

\(^29\) 42 U.S.C. § 1982 (1988) (providing that all citizens shall have equal rights to purchase and convey real property). For over a century, this statutory protection lay dormant; courts assumed that its prohibitions were no greater than any constitutional prohibition on housing discrimination. \textit{Schwemm, supra note 15, § 27.1, at 27-2 to 27-3; Kushner, supra note 28, § 1.01; see infra note 34 (discussing later expansion of § 1982).}

\(^30\) S. 3296 & H.R. 14765, 89th Cong., 2d Sess. (1966). A Senate filibuster prevented floor debate on the bill. 112 \textit{Cong. Rec.} 1183 (1966). During this period, Martin Luther King, Jr., started a national campaign against housing discrimination in Chicago. The campaign met with controversy when Mayor Richard J. Daley and seven black committeemen told King to "go back to Georgia." \textit{DeVise, supra note 20, at 494-95.} King responded with a campaign of civil disobedience. Massive rioting, looting, and arson ensued on the city's west side, and King conducted numerous marches through white neighborhoods in the city. Eventually, Mayor Daley agreed to convene a watchdog fair housing agency. \textit{Id.}


\(^33\) \textit{Report of the National Advisory Commission on Civil Disorders} 1 (March 1, 1968) [hereinafter Kerner Commission Report] (concluding that America was "moving towards two societies, one black, one white—separate and unequal"). The Kerner Commission further noted that thousands of blacks had attained income levels and living standards matching or exceeding those of whites who "upgraded" themselves from ethnic neighborhoods; yet blacks remained in predominately black neighborhoods because they were "effectively excluded" from white residential areas. \textit{Id.} at 244.

The Fair Housing Act was signed into law just seven days after the assassination of Dr. Martin Luther King, Jr. King's assassination sparked race riots in major urban areas across the country, and galvanized quick support for the Act in the House. \textit{Schwemm, supra note 15, § 5.2, at 5-4 to
the bill into law on April 11, 1968.34

B. Substantive and Administrative Scope of the Fair Housing Act

The Fair Housing Act prohibits housing practices that discriminate on the basis of race.38 The specific prohibitory provisions of the Act are quite detailed; many controversies can be resolved from the plain language of the statute.36 Section 3604(a) of the Act has the broadest scope. That section makes unlawful: (1) discriminatory refusals to sell or rent after the making of a bona fide offer; (2) discriminatory refusals to negotiate for the sale or rental of a dwelling; and (3) discriminatory practices that otherwise make unavailable or deny housing to any person.37 The language of this section, among other things, prohibits the practice known as steering, whereby prospective home buyers or renters are channelled to designated areas on the basis of race.39 Other subsections of section 3604 prohibit racial discrimination in the terms and conditions of a sale or rental of a dwelling, or in the provisions of services connected with the sale or rental;40 publishing advertisements indicating a racial prefer-
ence; representing that a dwelling is unavailable when it is available; or inducing or attempting to induce the sale or rental of a dwelling by representations regarding the entry or prospective entry to the neighborhood of persons belonging to a certain racial group.

Other substantive sections of the Fair Housing Act prohibit discrimination in the provision of ancillary services related to the sale and rental of housing. Section 3605 prohibits discrimination in the financing or appraising of residential real property. Section 3606 prohibits discrimination in the provision of brokerage services. This section prohibits denying or conditioning access, on the basis of

42 U.S.C. § 3604(c); see Ragan v. New York Times, 923 F.2d 995, 999 (2d Cir.) (holding that an advertisement violates § 3604(c) if it suggests to an ordinary reader that a particular racial group "is preferred or dispreferred for the housing in question"), cert. denied, 112 S. Ct. 81 (1991). The claim in Ragan alleged that the housing advertisements in question exclusively used white models in ads for properties located in predominantly white areas, and used black models only in connection with services advertised for these properties, or in ads for properties located in "black" areas. Id. at 996-98; see also Spann v. Colonial Village, 662 F. Supp. 541, 546 (D.D.C 1987) (requiring a showing of a pattern of discriminatory advertising; isolated instances of target modeling are insufficient to prove a § 3604(c) violation).

HUD regulations also delineate certain practices in addition to human models that are associated with discriminatory advertising. 24 C.F.R § 109.20 (1991) (directions implying racial preference based on certain well-known racial landmarks, selective use of a particular advertising media, selected geographical advertising). But cf. id. § 109.16(b) (stating that this section does not restrict affirmative advertising efforts (1) designed to attract persons to dwellings who otherwise would not be expected to apply, or (2) undertaken to remedy the effects of past discriminatory advertising of dwellings).

41. 42 U.S.C. § 3604(d); see Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (holding that § 3604(d) "establishes an enforceable right to truthful information concerning the availability of housing"). Professor Schwemm observes that the broad interpretation given § 3604(a) has resulted in that section absorbing the coverage of § 3604(d) and rendering it for the most part "superfluous." SCHWEMM, supra note 15, § 16.1, at 16-3.

42. 42 U.S.C. § 3604(e). This section prohibits the practice known as "blockbusting." See supra note 18 (discussing the mechanics and legal parameters of the blockbusting prohibition).

43. Id. § 3605. This section covers all businesses engaged in residential real estate transactions. Id. § 3605(a). Specific financing transactions covered by this section include mortgages, construction loans, and appraisals of property. Id. § 3605(b). In addition to prohibiting financial discrimination based on the race of an individual applicant, § 3605 also prohibits the practice of denying financial assistance for properties located in particular areas. This practice is commonly referred to as "redlining." Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912, 922-24 (7th Cir. 1989) (but noting plaintiffs failed to make out prima facie case); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 491-98 (S.D. Ohio 1976) (finding redlining activities also violated § 3604(a) and § 3617 of the Act); SCHWEMM, supra note 15, § 18.2(3), at 18-11 to 18-15 (discussing redlining in detail).

44. 42 U.S.C. § 3606.
race, to any multiple listing service, real estate brokers organization, or facility relating to the business of selling or renting housing. A final section prohibits acts that interfere with another person’s housing rights. Section 3617 makes it unlawful to coerce, intimidate or interfere with any person: (1) in the exercise or enjoyment of housing rights; (2) on account of his having exercised or enjoyed any housing right; or (3) on account of his having aided or encouraged any other person in the exercise or enjoyment of any housing rights. Many activities that violate section 3617 also violate provisions of either sections 3604, 3605 or 3606. There is conflict as to whether a section 3617 violation may occur absent a concurrent violation of another Fair Housing Act prohibition. For

45. Among the issues involved in South-Suburban Housing Center was a controversy over the listing of properties in a certain multiple listing service. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 874, 885-87 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992); see infra notes 417-31 and accompanying text (discussing the Seventh Circuit’s application of the Fair Housing Act to the multiple listing service controversy). A multiple listing service is “an organization of real estate brokers which shares with its members the listings of all real estate parcels for sale that the other members have.” Blake v. H-F Group Multiple Listing Serv., 345 N.E.2d 18, 20-21 (Ill. 1976). When a home is listed for sale with a certain member broker, that broker will share the listing with all the other members of the listing service. If a member other than the listing broker sells the home, an arrangement is made for sharing the commissions earned. Id. at 21. This type of arrangement is common throughout the United States. The effectiveness of multiple listing services in marketing real estate is so great that the activities of some services are challenged as limiting competition and unreasonably restraining trade in violation of antitrust laws. Id. at 23-26; United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

46. Blake, 345 N.E.2d at 23-26. There is virtually no case law involving § 3606. SCHWEMM, supra note 15, § 19, at 19-1 to 19-3.

47. 42 U.S.C. § 3617.


50. See, e.g, United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) (holding that municipality’s exclusionary zoning decision interfered with low-income housing developer on account of its aiding minorities in their housing rights), cert. denied, 422 U.S. 821 (1975). This exclusionary zoning decision also interferes with prospective minority tenants in the exercise of their housing rights. Id.

51. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288 (7th Cir. 1977) (holding that exclusionary zoning decision violated both § 3617 and § 3604(a)), cert. denied. 434 U.S. 1025 (1978); United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977), appeal dismissed, 590 F.2d 242 (7th Cir. 1978) (holding house appraisals that treat race or ethnic origin as a negative in valuing property deny housing in violation of § 3604(a) as well as interfere with their housing rights protected under § 3617).

52. Compare Burrell v. City of Kankakee, 815 F.2d 1127, 1130-31 (7th Cir. 1987) (finding no independent violation where court held zoning decision did not make housing “unavailable” in violation of § 3604(a)) with Stackhouse v. DeSitter, 620 F. Supp. 208, 211 (N.D. Ill. 1985)
instance, no court has held that an exclusionary zoning decision violates section 3617 without also holding that it violates Section 3604(a). But several court decisions support the theory that an independent violation of section 3617 can be established, particularly when housing rights have already been exercised or enjoyed.

The Fair Housing Act provides broad and varying mechanisms to administer and enforce its provisions. Title VIII can be enforced either by the Attorney General or through private action. Most housing discrimination suits brought under Title VIII are private actions; although even one isolated discriminatory act violates Title VIII, the Act allows the Attorney General to initiate a suit only if he or she has reason to believe the defendant is engaged in a "pattern and practice" of discrimination.

The authority and responsibility for administering the Act is vested in the Secretary of Housing and Urban Development ("HUD"). Section 3608(e)(5) of the Fair Housing Act mandates that the Secretary "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of the [Act]." These Federal government "programs and activities" including housing "grants; loans; contracts; in-
surance; [and] guarantees." To comply with this mandate, HUD has promulgated rules and regulations imposing certain duties and conditions on program participants. The affirmative mandate imposed upon HUD sparked considerable controversy as to what actions were required to further the policies of the Act. The mandate also raised the issue of what policies or purposes the Act was designed to serve.

C. The Fair Housing Act: Dual Purposes of Eliminating Discrimination and Promoting Integration

In Trafficante v. Metropolitan Life Insurance Co., the Supreme Court unanimously interpreted the Fair Housing Act to promote integrated housing as well as prohibit discrimination in housing. Referring to the Senate floor debate, the Court held that the statute’s purpose was to replace the ghettos with “‘truly integrated and balanced living patterns.’” The Trafficante Court also held that the statute was entitled to a broad and generous construction in order to effectuate its policies.


61. See e.g., 24 C.F.R. § 200.610 (1991) (stating that participants in Federal Housing Authority programs “shall pursue fair housing marketing policies in soliciting tenants” in order to achieve a condition in which persons of similar incomes have a similar range of housing choices).

62. See infra note 65 and accompanying text (discussing the Fair Housing Act’s dual goals of eliminating discriminatory housing practices and promoting integrated housing).

63. 409 U.S. 205 (1972).

64. Id. (specifically holding that white tenants in a large apartment complex had standing to sue their landlord for discriminating against minorities). The Supreme Court reaffirmed the importance of integrated housing in Linmark Assoc. v. Willingboro, 431 U.S. 85 (1982). The Court expressly recognized that “substantial benefits flow to both whites and blacks from interracial association.” Id. at 94-95.

65. Id. at 211 (quoting Senator Mondale at 114 CONG. REC. 3422 (1968)). The Trafficante Court also noted the scarcity of legislative history available to determine the congressional intent behind the Act. Id. at 212; see also T. Alexander Aleinikoff, Note, Racial Steering: The Real Estate Broker and Title VII, 85 YALE L.J. 808, 821 n.49 (1976) (noting that Title VIII was introduced on the floor of the Senate, and therefore legislative history must focus on actual floor debate); SCHWEMM, supra note 15, § 5.2, at 5-5 (stating that the legislative history did not include the committee reports and documents normally accompanying major legislation, and that most important statements of scope and intent were made during floor debate); Jean E. Dubofsky, Fair Housing: A Legislative History and a Perspective, 8 WASHBURN L.J. 149 (1968) (delineating the full legislative history behind the 1968 Act).

66. Trafficante, 409 U.S. at 212.
1. The Duty To Integrate: The Distinction Between Public and Private Entities

Many lower courts have interpreted the language in *Trafficante* to mean that the Fair Housing Act requires more than a neutral posture towards integration, and have interpreted the mandate as imposing an affirmative duty to integrate upon public entities. Although the affirmative duties imposed by section 3608 of the Fair Housing Act apply explicitly only to HUD, courts have interpreted the language also to impose a duty to integrate on entities participating in or receiving funds from HUD-sponsored housing programs. Pursuant to this interpretation, HUD has imposed regulations requiring that local housing authorities and other recipients of federal housing assistance undertake certain integrative efforts, including the development of affirmative marketing plans geared towards ensuring that persons with similar incomes have similar housing choices.

Whether a private duty to integrate exists is less clear. The standard of review applied by courts to suits arising under the Fair

67. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1973) (finding housing authority obligation under § 3608 to take affirmative steps to promote racial integration in public housing); Shannon v. HUD, 436 F.2d 809, 820 (3d Cir. 1970) (finding color-blindness in national housing policy is impermissible); United States v. Charlottesville Redevel. & Hous. Auth., 718 F. Supp. 461, 468 (W.D. Va. 1989) (imposing upon local housing authority a duty to pursue the goal of integration); see also Linda M. Vodar, Note, The Use of Racial Housing Quotas To Achieve Integrated Communities: The Oak Park Approach, 6 LOYOLA U. CHI. L.J. 164, 177 (1975) (arguing that the Fair Housing Act's mandate to avoid discrimination "does not mean that agencies should ignore the effects of racial factors"). Brown v. Board of Education also supports the public duty to integrate housing. 347 U.S. 483 (1954); see GEORGE R. METCALF, FAIR HOUSING COMES OF AGE 187-94 (1988) (detailing how public housing integration efforts directly affect school integration efforts, and concluding that, because Brown held officially segregated schools to be unconstitutional, requiring governments to promote integrated housing will further advance the Supreme Court's constitutional mandate).

This public duty to integrate is not absolute. Cf. Board of Educ. v. Powell, 110 S. Ct. 2722, 2738 (1991) (stating that government has no further duty to maintain school integration once good faith desegregation efforts have been accomplished).

68. United States v. Charlottesville Redevel. & Hous. Auth., 718 F. Supp. 461, 464-65 (W.D. Va. 1989); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1974); see also Exec. Order 12,259, supra note 60, at § 1-103 (interpreting §3608(e)(5) as covering all applicants and participants in all federal housing programs); cf. *Trafficante*, 409 U.S. at 212 (granting the language of the Act a broad construction to effect its policies). But see Acevedo v. Nassau County, 500 F.2d 1078, 1082 (2d Cir. 1974) (applying § 3608 only to HUD).

69. See 24 C.F.R §§ 200.610 to 200.640 (1991) (requiring participants in subsidized housing programs to affirmatively administer them to ensure individuals with similar income levels have a like range of housing choices available to them); 24 C.F.R. §§ 880.601 to 881.601 (1991) (requiring federally assisted housing developers to undertake marketing activities to ensure housing opportunities are available to families who are least likely to apply).
Housing Act derives largely from Title VII employment law precedent. The Supreme Court has held that under Title VII, employers are not required to implement efforts to achieve racial balance in the work force. In the context of the Fair Housing Act, the Seventh Circuit recently stated in Village of Bellwood v. Dwivedi that Congress did not intend to charge private realtors with the burdens of benign intentions that had racial effects beyond their control. However, the United States Civil Rights Commission has stated that to promote integration successfully, a duty to promote integration must also be imposed upon private entities as well. The Commission noted that the duty to integrate must apply to everyone, or there will be only scattered success. Assuming that private entities may not be required to take affirmative steps to integrate housing, the next issue is determining what voluntary action a private entity may take to promote the integration goal of the Fair Housing Act.

2. Promoting the Integration Goal by Eliminating Discrimination

There is considerable debate over what methods may be used to promote the Act's goal of integration. The stated purpose of Title VIII is "to provide, within Constitutional limitations, for fair hous-

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70. See infra notes 142-233 and accompanying text (discussing in detail the standard of review applied in cases arising under Title VIII).
71. See Sheet Metal Workers v. EEOC, 478 U.S. 421, 457-62 (1986) (discussing legislative history leading to enactment of § 703(j) of Title VII, which expressly disclaimed any duty by labor organizations or labor-management committees to maintain racial balance in the workplace); see also Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1988) (stating that the Court has "on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII").
72. 895 F.2d 1521 (7th Cir. 1990).
73. Id. at 1529; see also United States v. Parma, 661 F.2d 562, 571 (6th Cir. 1981) (holding that "private attitudes and opinions are not subject to official control"); Brown v. Artery Org., 654 F. Supp. 1106 (D.D.C. 1987) (finding that imposing a duty to integrate on private landlords and developers would make them responsible for consequences out of their control, such as the racial mix in the community, and would likely halt efforts to upgrade housing stock); cf. Brown v. Board of Educ., 347 U.S. 483, 494 (1964) (holding unconstitutional only official, de jure segregation).
74. EQUAL OPPORTUNITY IN SUBURBIA: REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 52 (July 1974) [hereinafter CIVIL RIGHTS COMMISSION]. The Commission stated that firms that were part of the housing market must take affirmative action to seek out minority clientele, and builders must develop plans for minority home seekers, including numerical goals. Id. at 70. The Commission noted that a remedy must both end discrimination and broaden housing opportunities of low- and moderate-income families; success on only one front will perpetuate segregation. Id. at 63.
75. Id.; see also James A. Kushner, The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing, 42 VAND. L. REV. 1049, 1114 (1989) (discussing the need to provide incentives to real estate professionals in order to facilitate free choice and integration in housing).
ing throughout the United States.”

However, neither the statute, nor any Supreme Court opinion, specifically defines what “fair housing” means. There are several competing views; 1) that Title VIII was designed only to eliminate discrimination; 2) that Title VIII was designed to eliminate discrimination and promote integration; or 3) that Title VIII was designed to eliminate discrimination in housing and thereby promote integrated housing. The Supreme Court has championed the importance of racially integrated housing, but it has not held that promoting integrated housing will meet the congressional mandate to provide fair housing. It is also difficult to divine congressional intent from the legislative history behind the 1968 Act; the history is largely confined to floor debate in the Senate. Federal courts interpreting the statements made dur-

78. Id. at 48. Under this definition, “fair housing” means “open” housing, “free from discrimination and accessible to all in free market competition, regardless of the racial pattern that results.” Id.
79. Id. Under this definition, “fair housing” is integrated housing, eliminating discrimination would be insufficient to carry out the stated policy of the Fair Housing Act. Id. Alexander Polikoff argues that HUD, through its published fair housing guidelines and agreements with private organizations, has interpreted Title VIII to embody an integrative purpose independent of its purpose of ending discrimination in housing. Id. at 49.
80. Id. at 48. This definition assumes that integration will result from the elimination of discrimination, and does not intend to specifically authorize race-conscious programs to achieve integration. Id.
82. See supra note 77 and accompanying text (noting how the Supreme Court has not yet defined parameters of fair housing).
83. See supra notes 32-34 (noting how Title VIII was hurriedly passed during a period of national crisis); Aleinikoff, supra note 65, at 821 (noting that since Title VIII was introduced on the floor of the Senate as an amendment to another bill, its legislative history must be based on hearings and debate). Statements of the floor sponsors of the Act give conflicting indications of its purpose. Senator Mondale, who introduced the bill on the Senate floor, stated that Title VIII was designed “to replace the ghettos by truly integrated living patterns,” and that “America’s goal must be that of an integrated society, a stable society.” 114 CONG. REC. 3422 (1968). But Senator Mondale also stated that “the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it,” and that “we readily admit that fair housing by itself will not move a single negro into the suburbs—the law of economics will do that.” 114 CONG. REC. 3421-22 (1968) (emphasis added).

Senator Brooke, a co-sponsor of the bill, echoed this equal opportunity sentiment, stating that although America’s future “must lie in the successful integration of all our many minorities . . . that future does not require imposed residential . . . integration; it does require the elimination of
ing the floor debate have held that Congress perceived that enforcement of the 1968 Act’s antidiscrimination provisions would be sufficient to promote the goal of integration.\textsuperscript{84}

There are several common antidiscrimination techniques used by persons and entities to combat discrimination and eliminate housing segregation. One popular and effective method of determining if housing discrimination exists is through the use of “testers.”\textsuperscript{85} Testing involves a team, usually made up of one black and one white, who are given comparable socioeconomic profiles.\textsuperscript{86} They separately seek like housing from one realtor or seller in order to investigate and prove allegations that the realtor is treating persons differently on the basis of race.\textsuperscript{87} Testers are often used to expose the realtor practice known as “steering,” whereby real estate agents encourage segregated housing patterns by directing home seekers to designated areas where their race is predominant and, conversely, withholding\textsuperscript{88}

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compulsory segregation in housing.” 114 CONG. REC. 2524-25 (1968). For an excellent discussion of the legislative history behind Title VIII, see Dubofsky, supra note 65, at 149-66.

\textsuperscript{84} United States v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir.), cert. denied, 488 U.S. 946 (1988); see Burney v. Housing Auth., 551 F. Supp. 746, 765 (W.D. Pa. 1982) (stating that Congress perceived the policies of antidiscrimination and antisegregation to be complementary); see also Rodney A. Smolla, \textit{In Pursuit of Racial Utopias: Fair Housing, Quotas and Goals in the 1980’s}, 58 S. CAL. L. REV. 947, 1006 (1985) (interpreting the HUD affirmative marketing regulations to be process rather than end result oriented).

This congressional perception paralleled congressional attitudes toward Title VII. See Sheet-metal Workers v. EEOC, 478 U.S. 421, 464 (1986) (finding congressional failure to discuss remedies when considering Title VII resulted from prevailing attitude that prohibitive language would be sufficient to eradicate the effects of discrimination).

The 1988 amendments to the Fair Housing Act have not resolved the issue of congressional intent. Congress remained silent on this issue, although programs to promote integration had created controversy in the federal courts for twenty years. The House did defeat an amendment to the 1988 Act that would have prohibited all Title VIII integration maintenance programs. 134 CONG. REC. H4902-08 (daily ed. June 29, 1988). The defeat is sometimes cited as an inference of Congressional approval of affirmative action efforts. Kushner, supra note 75, at 1051. But see John M. Payne, \textit{Fair Housing for the 1990s: The Fair Housing Amendments Act and the Ward’s Cove Case}, 18 REAL. EST. L.J. 307, 336 (1990) (stating that defeat of affirmative action prohibition may not accurately reflect congressional sentiment-managers of the 1988 Act who vociferously fought any attempt to upset the carefully balanced compromise between civil rights and real estate lobbies).

\textsuperscript{85} Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (holding that testers have standing to sue under the Fair Housing Act); see James A. Kushner, \textit{An Unfinished Agenda, The Federal Fair Housing Enforcement Effort}, 6 YALE L. & POL’Y REV. 348, 352 (1988) (stating that a HUD study demonstrates that only testing can identify a pervasive scheme of discrimination, since victims seldom know when they have received disparate treatment; and that without testing, Title VIII is relegated to a symbolic role in the quest for fair housing).

\textsuperscript{86} Havens Realty, 455 U.S. at 371.

\textsuperscript{87} Id.

\textsuperscript{88} Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529 (7th Cir. 1990) (stating that misrepresenting to customers that properties are not available in certain areas constitutes illegal steering
or slanting\textsuperscript{89} information about properties in areas where the home seeker is a racial minority in order to channel them away from that area.\textsuperscript{90} Steering violates the Fair Housing Act prohibition against conduct that "otherwise make[s] unavailable or den[ies]" housing on the basis of race.\textsuperscript{91}

Another mechanism employed by municipalities to combat discriminatory housing practices is the promulgation of antisolicitation ordinances and for-sale sign restrictions.\textsuperscript{92} Antisolicitation ordinances limit the ability of realtors to contact uninterested or unwilling homeowners.\textsuperscript{93} Their purpose is to prevent realtor blockbusting tactics, which induce panic sales by white homeowners in areas of racial transition, and lead to rapid, all-black resegregation of the area.\textsuperscript{94} Similarly, restrictions on the size and placement of for-sale signs are designed to eliminate the proliferation of these signs, which "is widely perceived to be destabilizing to an integrated community."\textsuperscript{95}

In addition to enforcing the antidiscrimination provisions of the Act, public and private entities have also developed antidiscrimination programs in order to foster the goal of integration.\textsuperscript{96} Many of the antidiscrimination programs are primarily aimed at educating real estate professionals on avoiding liability under the Act.\textsuperscript{97} The

\textsuperscript{89} Heights Community Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 139-41 (6th Cir. 1985) (holding that realtor statements about specific properties or neighborhoods that tend to unduly influence customer choice on the basis of race, and are made with intent to steer, make housing otherwise unavailable in violation of § 3604(a)), cert. denied, 475 U.S. 1019 (1986).

\textsuperscript{90} Havens Realty, 455 U.S. at 366 n.1.

\textsuperscript{91} 42 U.S.C. § 3604(a) (1988); Dwivedi, 895 F.2d at 1529.

\textsuperscript{92} E.g., Curtis v. Thompson, 840 F.2d 1291, 1297-1300 (7th Cir. 1988) (ordinance prohibited any solicitation of homeowners who had signed a notice indicating they were not interested in selling their homes); see South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 887-99 (7th Cir. 1991) (examining the legality of various municipal solicitation and for-sale sign restrictions in the south suburbs of Chicago), cert. denied, 112 S. Ct. 971 (1992).

\textsuperscript{93} Curtis, 840 F.2d at 1298.

\textsuperscript{94} See supra note 18 (discussing blockbusting tactics in detail).


\textsuperscript{97} See Training Handbook, supra note 96. The Training Handbook deals extensively with
programs and local ordinances also attempt to facilitate black entry into underrepresented neighborhoods, but primarily by promoting the neighborhood or community as race neutral and committed to equal opportunity in housing.\textsuperscript{96} The programs largely ignore efforts to maintain integration.\textsuperscript{96}

Enforcement of the Fair Housing Act and implementation of antidiscrimination efforts have not ended housing segregation in America. First, housing enforcement efforts are not uniform; there is greater compliance in areas where there is stricter enforcement of the Act.\textsuperscript{100} Second, real estate brokers are economically motivated, and often discriminate because they fear that selling a house in a white neighborhood to a black person will cost them future busi-

\textsuperscript{98} See \textit{Fair Housing Compliance Manual}, supra note 96. The manual focuses exclusively on avoiding conduct that discriminates against minorities; see also HUD-NAR VAMA, supra note 96. The HUD-NAR VAMA also focuses more on fostering desegregation than maintaining integration; its regulations primarily emphasize equal opportunity and free housing choice. The HUD-NAR VAMA does provide for "affirmative marketing" in order to attract minorities to underrepresented areas. However, the language in the HUD-NAR VAMA is distinctly neutral, defining the object of "affirmative marketing" to be providing free choice, and ensuring that all people of similar financial resources feel welcome to apply and are assured of equal opportunity. HUD-NAR VAMA, §§ 3(b)-3(c) at 2.

The HUD-NAR VAMA advertising requirements require realtors to advertise in a way designed to make housing availability known to all persons with similar interests and financial resources, but do not require any specific advertising techniques, such as advertising in minority media. \textit{Id.} § IV(A)(5), at 3. It should be noted that the VAMA does not prohibit targeted advertising either. The Civil Rights Commission explicitly supports this type of advertising, stating that affirmative action requires seeking out minority clientele by advertising in minority media. \textit{See Civil Rights Commission}, supra note 74, at 62; see also Polikoff, supra note 77, at 49 (arguing that HUD-NAR VAMA sanction's the use of pro-integration activities by private real estate brokers).

However, the VAMA definition of affirmative marketing is much different than that used by organizations attempting to maintain integration. \textit{See infra} notes 308-10 and accompanying text (defining affirmative marketing as targeting specific racial groups for special outreach efforts in order to foster continuing housing integration).

\textsuperscript{99} See supra note 98 (early efforts aimed mainly at achieving integration). Park Forest, Illinois, passed into law a package of "integration maintenance" ordinances in 1973, establishing an avowed commitment to equal opportunity in housing. However, a proposed "exempt location" provision that would have permitted "steering" in order to maintain racial balance was dropped from consideration. \textit{See Berry}, supra note 1, at 373-74 (discussing in detail the provisions of the Park Forest ordinance, and asserting that Park Forest officials assumed that integration could occur naturally in a housing market free from racial bias).

\textsuperscript{100} Robert G. Schwemm, Responses to Housing Discrimination and Residential Resegregation, in The Fair Housing Act After Twenty Years: A Conference At Yale Law School, March, 1988, at 63, 65 (Robert G. Schwemm ed., 1989) [hereinafter Yale Conference] (asserting that housing suppliers behave differently if they are operating in an area with an active Fair Housing Organization that engages in extensive compliance monitoring).
ness. Third, apart from any overt discrimination, economic differences between blacks and whites also limit the housing opportunities available to black home buyers. Finally, the success of community integration depends largely on the willingness of different racial groups to live together.

The use of antidiscrimination programs by themselves has also failed to achieve lasting integration. Successful integration is a two-step process that requires 1) eliminating segregation by facilitating black entry into all white areas, and 2) maintaining a stable racial balance to prevent resegregation. Enforcing the Title VIII prohibitions and implementing pure antidiscrimination programs only facilitates the first step. The goal of maintaining stable hous-

101. Civil Rights Commission, supra note 74, at 16, 20 (stating that there is economic pressure within the real estate industry to "toe the line" because perpetuating the dual housing market increases realtor profits); see also Richard C. Firstman, Trying Hard To Keep that Racial Mix; Shaker Heights, Oak Park: Tale of Two Midwest Suburbs, Newday, Dec. 9, 1990, at 7 (asserting that for-profit mentality of brokers is inconsistent with programs designed to maintain integration).

102. Karl A. Tauber, Causes of Residential Segregation in Yale Conference, supra note 100, at 37. Tauber delineates three perspectives on why segregation continues regardless of antidiscrimination efforts:

(1) Economic differences: most blacks cannot afford suburban housing. Many work in the central city, often in government jobs, and prefer to live close to work. Id. Black neighborhoods allow easy access to "black" consumer, social, and cultural needs. People looking for different housing use friends and co-workers as sources, and search along usual transportation routes. Thus, they usually find housing near where they already live. Id.

(2) Personal preference: Blacks prefer a neighborhood that is over 50% black; whites prefer the opposite. If whites perceive increasing black migration into a neighborhood, they will leave. Blacks who perceive a neighborhood is white dominated will stay away. Thus, free choice promotes and reinforces segregation. Id.

(3) Institutional racism: Past discrimination inhibits black capital investment in home equity. Lack of ability to purchase homes in many neighborhoods reflects the lack of inherited wealth resulting from past discrimination. Id. at 37-38.


105. Note, Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies To Promote Residential Integration, 93 Harv. L. Rev. 938, 944-45 (1980). The author also comments that it is much easier to promote initial desegregation by facilitating black entry than to maintain integration by persuading whites to move into mixed neighborhoods. Id. at 957. Winning the second prong requires taking into account white prejudice when formulating government policy. Id.

106. Id.; see infra notes 114-18 and accompanying text (discussing the phenomena of neighborhood "tipping" and how it can rapidly destroy the integrated character of a neighborhood).
ing integration has led many public entities and private groups to abandon a color-blind approach towards housing integration. These groups consciously take race into account when formulating housing programs, and utilize affirmative action measures to further the integration goal.

3. Promoting the Integration Goal Through Race-Conscious Affirmative Action Programs

Affirmative action housing programs operate on the premise that integration will not occur naturally, even when the substantive prohibitions of the Fair Housing Act are strictly enforced. Race-conscious programs were created in an attempt to remedy the danger of resegregation in areas experiencing racial transition. The programs vary widely in technique and scope, but all share two common elements. First, the programs are designed to promote the Act's ultimate goal of achieving stable, racially integrated housing. Second, the means to this end involves purposefully considering race when providing housing or housing services.

Most race-conscious programs are implemented in response to the threat of racial "tipping." Tipping characterizes a phenomenon in which an increasing ratio of blacks to whites in a neighborhood triggers white flight from the neighborhood, resulting in resegrega-

107. See infra notes 245-353 and accompanying text (discussing in detail various race-conscious fair housing programs and their legality under Title VIII).
108. See Note, supra note 105, at 957.
109. See Firstman, supra note 101, at 7 (reporting that professionals in the housing industry believe that affirmative action measures are needed to maintain integration because segregation always results when the normal housing market takes its course).
110. See cases cited infra note 114 (regarding instances where race-conscious techniques were instituted in response to the threat of neighborhood tipping).
111. SCHWEMM, supra note 15, § 11.2(2)(a), at 11-5 to 11-8.
112. Id. at 11-7.
113. Id.
The concept of tipping captures the essence of resegregation; black entry creates white fear, leading to further white exit and decline in white entry, which further increases white fear, encouraging still more whites to leave and fewer whites to enter. Ultimately, an all-black neighborhood is created. Some race-conscious programs have proved very effective in preserving a stable racial mix. However, their legality under the Fair Housing Act has been the subject of much debate.

There was little discussion of integration maintenance programs when Congress passed the original Fair Housing Act in 1968. Nor did Congress address the legality of these programs when passing the 1988 amendments, although judges and scholars had debated their legality and appropriateness for years. The issue of legality arises because race-conscious integration programs create tension between the Act's dual goals of ending housing discrimination and maintaining a stable racial mix.
tation and promoting integrated housing.\textsuperscript{123}

The tension created is racial, political, and legal.\textsuperscript{124} Some judges, scholars, and minority groups argue that race-conscious housing programs stigmatize minorities by reinforcing stereotypes, which leads to further discrimination.\textsuperscript{125} These race-conscious programs have created a rift between traditional advocates of racial integration because of their potential limits on black access to housing. Some advocates argue that their use reinforces and implies acceptance of alleged white prejudice inherent in the programs.\textsuperscript{126} Political tension is created because the programs are usually introduced by white-dominated city governments; minorities have little or no voice in the process.\textsuperscript{127} Opponents of the programs assert that integration maintenance prevents black concentrations in suburbs, and that successful large scale integration maintenance would be diffused equally across a metropolitan area.\textsuperscript{128} This, opponents argue, would dilute black political power and dilute the strength of black economic, religious, and cultural institutions that facilitate a cohesive group identity.\textsuperscript{129} Indeed, history has shown that in cities with suc-

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  \item \textsuperscript{124} See infra notes 125-35 and accompanying text (discussing reasons for the tension between the goals of the Act).
  \item \textsuperscript{125} See Burney, 551 F. Supp. at 758-59 (noting that government housing quota plans stigmatize blacks through negative implications accompanying government policies that restrict black access to housing; the white majority perceives quotas as official statements of black undesirability); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (warning that employment classifications based on race carry danger of stigmatic harm to minorities).
  \item \textsuperscript{126} Note, supra note 105, at 939; see also Yale Conference, supra note 100, at 119 (statement of Peter L. Flemister) (arguing that integration maintenance is pure discrimination against minorities, designed to maintain continued white domination and supremacy in society). For further discussion of whether race conscious programs connotate racial inferiority of blacks, see Robert C. Farrell, Integrating by Discriminating: Affirmative Action that Disadvantages Minorities, 62 U. Det. L. Rev. 553, 593 (1985).
  \item \textsuperscript{127} Starrett City, 840 F.2d at 1102 (asserting that integration maintenance programs single out those least represented in the political process to bear the brunt of a benign program); see also Smolla, supra note 122, at 916. Smolla argues that whites impose integration maintenance plans to prevent resegregation, and that no governing body of a predominantly white community has adopted a program to ensure blacks are a majority. Id. This is not successful integration to whites. Id.
  \item \textsuperscript{128} Smolla, supra note 122, at 919.
  \item \textsuperscript{129} Id. Integration maintenance programs are also attacked as irresponsible attempts at government-sponsored social engineering. President Reagan's Assistant Attorney General William C. Bradford stated that "race-conscious" remedies are unacceptable. "I don't think any government
cessful integration maintenance programs in place, whites dominate the community power structures.\textsuperscript{130}

Finally, despite the benign motivations of promoters, some race-conscious plans create legal tension because they discriminate against the very groups the Fair Housing Act was designed to help.\textsuperscript{131} In particular, some race-conscious plans deny housing or make it otherwise unavailable to minorities in violation of the Fair Housing Act.\textsuperscript{132} Courts accuse benign quotas of violating section 3604(a) of the Act by denying housing or making it otherwise unavailable on the basis of race.\textsuperscript{133} Courts are more receptive to the use of pro-integration incentive programs and affirmative marketing programs; however, many realtors and some minority groups assert that these race-conscious efforts also violate section 3604(a) by making housing otherwise unavailable on the basis of race.\textsuperscript{134} In particular, detractors of the latter programs argue that they consti-

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ought to be about the business to reorder society, or neighborhoods, to achieve some degree of proportionality in the racial composition of housing." \textsc{Wash. Post}, July 11, 1984, at A4. \textit{But cf. Fair Housing Hearings}, \textit{supra} note 15, at 22 (statement of Alexander Polikoff) (quoting William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division of the Unites States Department of Justice) ("We have no opposition to affirmative marketing efforts in order to reach out and encourage more minorities to move into communities where they aren’t, to encourage whites to move into minority communities."); \textsc{Otero v. New York Hous. Auth.}, 484 F.2d 1122, 1134 (2d Cir. 1973) (allowing housing officials to make decisions based solely on whether they immediately benefit minority groups would render them "willing, and perhaps un-witting, partners in the trend toward ghettoization of our urban centers").
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\textsuperscript{130} See \textsc{Firstman}, \textit{supra} note 101, at 9 (noting also that in Oak Park, one of the county’s most successfully integrated suburbs, there is only one black on the village board).

\textsuperscript{131} \textit{Starrett City}, 840 F.2d at 1099 (blacks forced to wait up to eleven times longer than whites for a public housing slot); \textsc{Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.}, 493 F. Supp. 1125, 1136 (S.D.N.Y. 1980), \textit{aff’d}, 647 F.2d 163 (2d Cir. 1981) (housing plan that prioritized applicants based on how they would affect racial makeup of complex had disparate impact on blacks).

\textsuperscript{132} See \textit{infra} notes 245-82 and accompanying text (discussing the effect occupancy quotas have on black access to housing).

\textsuperscript{133} \textit{Starrett City}, 840 F.2d at 1101 (holding that requiring blacks to wait substantially longer—eleven months longer on the average—than whites for open public housing slots in order to maintain integration was equivalent to denying housing to blacks). \textsc{United States v. Charlestonville Redev. & Hous. Auth.}, 718 F. Supp. 461, 469 (W.D. Va. 1989) (finding that occupancy quota in housing complex makes housing less available to blacks).

stitute illegal “steering,” which the Supreme Court defined as directing prospective home buyers or renters interested in equivalent properties to different areas according to their race.\footnote{Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979).}

The tensions created by race-conscious housing programs indicate proponents must justify their use. Determining whether the threat of resegregation makes a race-conscious program necessary or appropriate under Title VIII requires analysis of several issues underlying the phenomenon.\footnote{One issue is whether factors other than white prejudice contribute to racial tipping. A second problem is fixing the precise point at which a neighborhood will tip, and also what criteria to use in determining that tipping point. A final issue is...} One issue is whether factors other than white prejudice contribute to racial tipping.\footnote{See John Yinger, On the Possibility of Achieving Racial Integration Through Subsidized Housing, in HOUSING DESEGREGATION AND FEDERAL POLICY, supra note 77, at 290, 294-97. Yinger discusses the tipping phenomena at length and argues that analysis of racial transition should not focus exclusively on tipping. He asserts that one must analyze how racial transition is distributed throughout the entire metropolitan area, not just its effect on one neighborhood, and notes the possibility that discrimination focuses racial transition into certain neighborhoods and thereby magnifies the pressures that lead to complete resegregation. Id.} A second problem is fixing the precise point at which a neighborhood will tip,\footnote{See Note, supra note 105, at 942 (stating that the high mobility of Americans—one-sixth move every year—means that the tipping point can be reached without white residents leaving the community at abnormally high rates); see also Lind, supra note 5, at 643 (arguing that white prejudice leading to white flight is exacerbated by white homeowners’ behavior). Professor Lind further asserts that whites defer routine home maintenance as they lose confidence in the neighborhood’s future, in anticipation of investment in a new home. The playing out of this process in integrated neighborhoods leads people to associate these neighborhoods with reduced value and blight. Id.} and also what criteria to use in determining that tipping point.\footnote{United States v. Starrett City Assocs., 840 F.2d 1096, 1099 (2d Cir.) (noting that the general consensus places the tipping point at 10-20% minorities in a formerly all-white neighborhood), cert. denied, 488 U.S. 946 (1988); William E. Hellerstein, The Benign Quota, Equal Protection, and “‘The Rule in Shelley’s Case,’” 17 RUTGERS L. REV. 531, 534 (1963) (stating that the tipping point will vary based on the level of community prejudice, but holding that a 60/40 white to black ratio is the general range); Bernard Navasky, The Benevolent Housing Quota, 6 HOW. L.J. 30, 31 (1960) (estimating tipping point at 20-60%); Note, supra note 105, at 942 (noting the estimated tipping point is at 25% to 30% minority). Contra Fair Housing Hearings, supra note 15, at 183 (statement of Alexander Polikoff, Chairman, Business and Professional People for the Public Interest) (arguing that there is no set tipping point, and that the racial composition of home-seeker traffic is an important factor in measuring the danger of neighborhood tipping).} A final issue is...
deciding which programs will effectively combat tipping\textsuperscript{140} without violating the antidiscrimination provisions of Title VIII.\textsuperscript{141} When analyzing these issues, it is necessary first to determine what the proper standard of review is for analyzing disputes under the Fair Housing Act.

\section*{D. Standard of Review: The Title VII/Title VIII Analogy}

The Title VIII standard of review is primarily derived from Title VII precedent.\textsuperscript{142} Lower courts rely on the Supreme Court's language in \textit{Trafficante v. Metropolitan Life Insurance Co.}\textsuperscript{143} when making this analogy.\textsuperscript{144} The \textit{Trafficante} Court held that, under Title VII, Congress intended to define standing under the statute very broadly.\textsuperscript{145} It then held that "with respect to suits under the 1968 Act, we reach the same conclusion."\textsuperscript{146} Most lower courts have relied on this language as authority for applying Title VII precedents when analyzing whether particular conduct violates Title VIII.\textsuperscript{147}

\textsuperscript{140} This is an area of considerable disagreement. One commentator argues that only through access quotas will our society be able to achieve lasting integration. Marc A. Kushner, Note, \textit{The Legality of Race-Conscious Access Quotas Under the Fair Housing Act of 1968}, 9 \textit{CARDozo} L. \textit{REV.} 1053 (1988). The Civil Rights Commission has proposed creation of new communities as a way of combatting racial polarization. \textit{CIVIL RIGHTS COMMISSION}, supra note 74, at 56; \textit{see also} \textit{YALE CONFERENCE}, supra note 100, at 40-42 (statement of Richard F. Muth). Muth's argument is based on economics: Since whites are willing to pay more for proximity of members of the same group than blacks, the only remedy is to increase the amount whites are willing to offer for properties in integrated neighborhoods, such as through the use of mortgage assistance. \textit{See id.}

\textsuperscript{141} \textit{See United States v. Charlottesville Redevelopment \\& Housing Authority}, 718 F. Supp. 461, 468 (W.D. Va. 1989) ("[T]he mere existence of that duty [to integrate] does not mean that defendant is free to take any steps it wishes in furtherance of that duty.").

\textsuperscript{142} \textit{SCHWEMM}, supra note 15, § 10.1, at 10-1 to 10-4.

\textsuperscript{143} 409 U.S. 205 (1972).


\textsuperscript{146} \textit{Id.}

\textsuperscript{147} Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 190 (7th Cir. 1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979); Williams v. Mathews Co., 499 F.2d 819, 826 (8th Cir.), \textit{cert. denied}, 419 U.S. 1021 (1974); United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir. 1973), \textit{cert. denied}, 416 U.S. 936 (1974).

There is still debate as to the propriety of strictly analogizing Title VII to Title VIII. Some courts and commentators suggest Title VIII should have its own independent doctrine of analysis. \textit{See Residents Advisory Bd. v. Rizzo}, 564 F.2d 126, 148-49 (3d Cir. 1977) ("[T]he consequences
When determining whether a plaintiff has established a prima facie case of housing discrimination, courts utilize the doctrine set forth in *Griggs v. Duke Power Co.*\(^{148}\) another Supreme Court Title VII case. The *Griggs* Court held that a plaintiff may prove a violation of Title VII by showing either discriminatory intent or discriminatory effect.\(^{149}\)

1. Proving Discriminatory Intent

Discriminatory intent involves disparate treatment, which, under Title VIII means "treating a person differently because of race. . . . It implies consciousness of race, and purpose to use race as a decision-making tool."\(^{150}\) The elements of proof needed to establish a prima facie intentional discrimination case under Title VIII are derived principally from *McDonnell Douglas Corp. v.

of an error in admitting a tenant do not seem nearly as severe, as, for example, the consequences of an error in hiring an unqualified airline pilot."\(^{150}\) (quoting Elliot M. Mineberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 174 (1976); see also Christopher P. McCormack, Comment, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 565 (1986) (noting that fewer business considerations support the defense of business necessity in housing than in employment).

In addition, under Title VII, public or private employers have indistinguishable interests and duties, neither has a duty to maintain an integrated workforce. Title VIII creates separate, more stringent standards for public entities, and the regulatory aspects of government with respect to housing have no counterpart in Title VII. *Id.* at 567, 580-81; see 42 U.S.C. §§ 3608-3609 (1988) (placing an affirmative duty on public entities to achieve integration in public housing).


149. *Id.* at 430-31 (finding that an required by an employer as a prerequisite to an employee's promotion had an illegal disparate impact because it adversely affected a disproportionately large number of blacks). The fact that the Senate rejected an amendment during the 1968 debates that would have required proof of intent to discriminate under some circumstances further supports the position of most courts that the Fair Housing Act has a discriminatory effect standard. 114 CONG. REC. 5214-22 (1968). *But see* President's Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1141 (Sept. 13, 1988) (President Reagan insisting that Title VIII speaks only to intentional discrimination, and rejecting the position that a Title VIII violation can be established by showing conduct has a racially disparate impact or discriminatory effect).


150. Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-30 (7th Cir. 1990) (also warning that one should not equate differences in outcome with differences in treatment).
Green,\textsuperscript{151} an employment discrimination case decided under Title VII.\textsuperscript{152} Under Title VIII, a prima facie case of disparate treatment is established by showing: (1) the plaintiff is a member of a racial minority or other protected class; (2) plaintiff applied for and was qualified to rent or purchase the unit involved; (3) plaintiff was rejected by the defendant; and (4) the housing opportunity remained available afterwards.\textsuperscript{163} This test was recently applied in Asbury v. Brougham,\textsuperscript{164} where an apartment complex manager stated to a black customer that no apartments were available.\textsuperscript{165} The manager also refused to provide the customer with price or room layout information.\textsuperscript{166} The Tenth Circuit found a prima facie case of disparate treatment because a white customer applying the next day was told several apartments were available, and was also shown several room layouts.\textsuperscript{167} The four elements are not always rigidly adhered to. Discriminatory intent analysis is also commonly applied to racial steering and exclusionary zoning claims, where no outright refusal to sell or rent is present.\textsuperscript{168}

A violation of the Fair Housing Act will be found even if race is not the sole motivating factor in the denial of housing.\textsuperscript{169} To rebut a

\begin{itemize}
\item \textsuperscript{151} 411 U.S. 792 (1973).
\item \textsuperscript{152} Id. at 802. McDonnell Douglas established that a prima facie case of disparate treatment in the employment context was made if: (1) plaintiff was a member of a protected class; (2) plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite these qualifications, the plaintiff was rejected; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications. Id. at 802; see also Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (noting that disparate treatment is shown when employers treat some people less favorably than others because of their race; proof of discriminatory motive is essential).
\item \textsuperscript{153} E.g., Phillips v. Hunter Trails Assocs., 685 F.2d 184, 190 (7th Cir. 1982).
\item \textsuperscript{154} 866 F.2d 1276 (10th Cir. 1989).
\item \textsuperscript{155} Id. at 1280.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. at 1280-81.
\item \textsuperscript{158} See Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-30 (7th Cir. 1990) (holding proof of discriminatory motive is critical); Heights Community Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 140-43 (6th Cir. 1985) (implying disparate treatment will be found when a realtor has knowledge that his conduct is likely to produce a racially discriminatory effect on the housing market), cert. denied, 475 U.S. 1019 (1986); United States v. City of Parma, 661 F.2d 562, 575 (6th Cir. 1981) (holding that refusal by city to complete application for federal funds for low-income housing where pressing need for it was revealed shows discriminatory motive), cert. denied, 456 U.S. 926 (1982); Resident's Advisory Bd. v. Rizzo, 564 F.2d 126, 142 (3d Cir. 1977) (holding that discriminatory intent was shown where city joined opposition to townhome project, knowing some of the opposition was racially motivated, and also took affirmative steps to terminate projects knowing their discriminatory effect), cert. denied, 435 U.S. 908 (1979).
\item \textsuperscript{159} Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979) (holding that the fact that denial is also motivated by economic concerns is insufficient); Dwivedi, 895 F.2d at 1530
\end{itemize}
prima facie case of disparate treatment, the defendant must articulate a legitimate, nondiscriminatory purpose for denying housing.160 The purpose must be specific and supportable, and not a mere pretext to discrimination.161 Asbury v. Brougham162 also illustrates this concept. There the apartment manager defended her claim of unavailability on the basis that the building was classified as all-adult, and the plaintiff had a child.163 The Tenth Circuit ruled this defense was merely a pretext for discrimination, because exceptions to the rule had been made in the past for white tenants.164

2. Proving Discriminatory Effect

In addition to finding a violation of the Act where a housing supplier intentionally discriminated on the basis of race, courts will also find conduct violative of Title VIII if it has a discriminatory effect on a particular racial group. Courts favor discriminatory effect analysis because it is easier to prove a prima facie case of discriminatory effect than one of disparate treatment.165 Courts assert that discriminatory effect analysis is more effective in implementing the Act's purpose of ending discrimination in housing.166

(stating in dicta that a realtor's fear that he would be ostracized and lose business if he sold to a black in a white neighborhood is an insufficient defense to racial steering).


162. 866 F.2d 1276, 1281-82 (10th Cir. 1989).

163. Id.

164. Id.

165. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (noting that requiring proof of discriminatory intent is an impossible burden to satisfy because intent, motive, and purpose are elusive concepts), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (finding use of discriminatory effect analysis justified because "clever men can easily conceal their motivations"), cert. denied, 422 U.S. 1042 (1975); see McCormack, supra note 147, at 564 (noting that a low threshold of "business purpose" can rebut the inference of intentional discrimination; under disparate impact analysis, a much more stringent business purpose test is imposed).

166. Arlington Heights, 558 F.2d at 1290. The Arlington Heights court asserts that overt bigotry is unfashionable, but racial discrimination has not disappeared. Id. at 1287.
A prima facie case of discriminatory effect requires proof that a facially neutral practice either (1) has a disparate impact on a protected racial group or (2) perpetuates the effects of segregation.\textsuperscript{167} There are few pure discriminatory effect cases, as most Title VIII cases also involve intentional discrimination or perpetuation of segregation claims as well.\textsuperscript{168}

a. Disparate impact analysis

In a true disparate impact analysis, the degree a challenged housing practice impacts on a racial group is relevant in making out a prima facie discriminatory effect claim.\textsuperscript{169} In Betsey v. Turtle Creek Associates,\textsuperscript{170} for example, the Fourth Circuit found a violation where there was a statistical showing of a substantially greater adverse impact on minorities.\textsuperscript{171} The defendant apartment complex owner had instituted an all-adult policy in a housing complex where 68.3\% of the families with children were minorities. To implement this policy, 75\% of the minorities were evicted, but only 27\% of the whites.\textsuperscript{172} In contrast to the Turtle Creek decision, the Seventh Circuit, in Metropolitan Housing Development Corp. v. Village of Arlington Heights\textsuperscript{173} found that a municipal zoning decision that excluded a planned low-income housing project did not have a substantial disparate impact on minorities. The court noted that 60\% of the persons on the waiting list for subsidized housing were white.\textsuperscript{174} The latter case also raises the issue of how to measure properly the extent of discriminatory effect. Courts are divided as to whether a housing practice's disparate impact should be measured by comparing the percentages of each racial group affected by the practice to their percentage of the total population,\textsuperscript{175} or by compar-

\textsuperscript{167} Id. at 1290.
\textsuperscript{168} SCHWEMM, supra note 15, § 10.4(2)(b), at 10-25 to 10-29.
\textsuperscript{169} See Southend Neighborhood Improvement v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984) (holding that Title VIII only prohibits practices with "significant" discriminatory effects).
\textsuperscript{170} 736 F.2d 983 (4th Cir. 1984).
\textsuperscript{171} Id. at 987-88; see also Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988) (finding disparate impact found where two-thirds of group eligible for blocked housing project were minorities).
\textsuperscript{172} Turtle Creek, 736 F.2d at 987-88.
\textsuperscript{174} Id. at 1291. Note that the disparate impact analysis in Arlington Heights was only one prong in the four-factor perpetuation of segregation test promulgated by the Seventh Circuit. Id. at 1290.
\textsuperscript{175} Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir.) (main-
ing the absolute numbers of each racial group affected.\textsuperscript{176}

In either case, the defendant can rebut the prima facie inference of discrimination by showing "a business necessity sufficiently compelling to justify the challenged practice."\textsuperscript{177} Like discriminatory effect analysis, the business necessity defense is also derived from \textit{Griggs v. Duke Power Co.},\textsuperscript{178} a Title VII employment discrimination case. In \textit{Griggs}, the Supreme Court held that a defendant may justify a job requirement that has a discriminatory effect by demonstrating a business necessity for the requirement.\textsuperscript{179} In particular, the requirement must have a manifest relation to successful job performance.\textsuperscript{180} Under Title VIII, when weighing the defendant's interests against the discriminatory effect of the challenged housing practice, courts examine the availability of alternatives and their cost to the defendant.\textsuperscript{181} The burden is different and more difficult to overcome than when a defendant is confronted with a showing of discriminatory intent.\textsuperscript{182} Defendants may overcome a showing of disparate treatment by articulating a legitimate, nondiscriminatory reason for the practice.\textsuperscript{183} In contrast, most courts impose a high threshold of justification in disparate impact cases.\textsuperscript{184}

b. Perpetuation of segregation analysis

In perpetuation of segregation analysis, the focus is on whether a housing decision produces a discriminatory effect on the community as a whole.\textsuperscript{185} This type of analysis is usually applied to claims that

\textsuperscript{176} In re Malone, 592 F. Supp. 1135, 1160-61 (E.D. Mo. 1984), aff'd \textit{sub. nom.} Malone v. City of Fulton, 794 F.2d 680 (8th Cir. 1986) (finding no disparate impact even though a higher percentage of blacks affected because more whites were affected than minorities).

\textsuperscript{177} \textit{Turtle Creek}, 736 F.2d at 987. See \textit{infra} notes 197-99, 211 for a more detailed discussion of the business necessity defense in the context of perpetuation of segregation claims.

\textsuperscript{178} 401 U.S. 424 (1971).

\textsuperscript{179} Id. at 431.

\textsuperscript{180} Id. at 431-32.

\textsuperscript{181} \textit{See} McCormack, \textit{supra} note 147, at 580. McCormack also asserts that where a defendant's decision is supported by subjective considerations, courts must examine whether the subjective nonracial factors have any objective utility in furthering his interest. \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{See}, e.g., United States v. Starrett City Assocs., 840 F.2d 1096, 1100-02 (2d Cir.) (rejecting threat of white flight as justifying imposition of racial quotas), \textit{cert. denied}, 488 U.S. 946 (1988); \textit{Turtle Creek}, 736 F.2d at 988 (requiring a compelling business necessity).

\textsuperscript{185} \textit{See} Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937-38 (2d Cir. 1988).
municipalities or other governmental bodies have used their zoning or land use powers to unlawfully block construction of integrated housing developments in predominantly white areas. In Metropolitan Housing Development Corp. v. Village of Arlington Heights, the Seventh Circuit held that if a housing decision "perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups." The Supreme Court has not directly ruled on the legality of this type of analysis; however, in Huntington Branch, NAACP v. Town of Huntington, the Court affirmed a Second Circuit decision that approved the use of perpetuation of segregation analysis. The Supreme Court declined to address the issue, however, because the defendant had conceded its validity.

Courts have developed two different ways of analyzing perpetuation of segregation claims. The Second Circuit's Huntington Branch opinion provided a traditional two-step discriminatory effects analysis, first analyzing the effect of the defendant's actions on maintaining segregated housing patterns in the community, and then, if the prima facie case was established, shifting the burden to the defendant to justify its actions as a business necessity. In Huntington Branch, the defendant city's zoning ordinance restricted construction of private, multifamily housing to a largely minority urban renewal area. The city refused to amend the ordinance to permit construction of a subsidized housing project that, with its goal of 25% minority occupancy, would begin desegregating a neighborhood that was 98% white. The court noted that minority families in Huntington were 250% more likely than white families to fall below the income cutoff that determined eligibility to live in the project. Thus, the Second Circuit concluded that the refusal impeded integration by restricting low-income housing, needed by minority

186. SCHWEMM, supra note 15, § 10.4(2)(c), at 10-29.
188. Id. at 1290.
190. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).
191. The town did not argue that the standard was incorrect, but that its conduct did not violate the standard. Id. at 936-37.
192. Id. at 937-39.
193. Id. at 938.
194. Id. at 937.
195. Id. at 938.
families, to predominantly black areas. The Second Circuit then addressed the business justification defense of the city, holding that the defense must meet two separate requirements: (1) It must be bona fide and legitimate, and (2) no less discriminatory alternatives must be available to the defendant. The court rejected the city’s defense, that the proposed site would promote traffic and health hazards, as not legitimate or bona fide. It also held that another proffered reason for denying a building permit, that it would encourage development in a predominantly black urban renewal area, could be accomplished just as effectively by providing tax incentives for developers.

The second method of analyzing perpetuation of segregation claims is the Arlington Heights multifactor balancing test, which encompasses both the prima facie case and any articulated defense. No one factor is dispositive as to whether a violation has taken place. Four distinct factors are analyzed: (1) the degree of discriminatory effect, (2) evidence of discriminatory intent, (3) the defendant’s reason for taking the challenged action, and (4)
whether the plaintiff seeks to compel the defendant to provide housing or merely to refrain from interfering with others who wish to provide housing.\textsuperscript{205} The Seventh Circuit in \textit{Arlington Heights} held that the least important factor was the showing of intent,\textsuperscript{208} and further held that close cases should be determined in favor of the plaintiff.\textsuperscript{207}

In \textit{Arlington Heights}, the Seventh Circuit applied this test to a claim that the Village violated the Fair Housing Act by refusing to rezone a tract of land that would be used to build low-income housing in an overwhelmingly white area.\textsuperscript{208} First, the court ruled that the discriminatory effect on minorities was relatively weak, because 60% of the people eligible for subsidized housing in the Chicago metropolitan area were white.\textsuperscript{209} Second, the court found that there was no specific evidence that the Village’s refusal to rezone the land was based on a desire to excluded minorities from the area.\textsuperscript{210} Third, the court ruled that the Village was acting within the ambit of statutorily authorized zoning authority, and thus, its decision was entitled to deference as legitimate government action.\textsuperscript{211} Finally, the court ruled that the plaintiffs did not seek to compel the Village to affirmatively aid the construction project, but only sought to enjoin the Village from interfering with “their plans to dedicate their land to furthering the congressionally sanctioned goal of integrated housing.”\textsuperscript{212} The Seventh Circuit remanded the case for further determination of the discriminatory effect issue.\textsuperscript{213} It held that on remand, if the district court found that there was no other land that was both properly zoned and suitable for low-income housing, it should rule that the Village’s refusal to rezone perpetuated segregation in viola-

\textsuperscript{205} Id. at 1293. The Seventh Circuit held that compelling a defendant to construct integrated housing or requiring that it take affirmative steps to ensure that it is built would entail massive judicial intrusion on private autonomy, but enjoining interference with a plaintiff’s attempt to build housing on land it owned was a permissible equitable remedy. \textit{Id.}

\textsuperscript{206} Id. at 1292.

\textsuperscript{207} Id. at 1294 (reasoning that it must liberally construe the Fair Housing Act).

\textsuperscript{208} Id. at 1291-94.

\textsuperscript{209} Id. at 1291; see \textit{supra} notes 175-76 and accompanying text (discussing whether disparate impact should be measured by comparing absolute numbers of each racial group affected, or by comparing percentages of each racial group affected).

\textsuperscript{210} \textit{Arlington Heights}, 558 F.2d at 1292.

\textsuperscript{211} Id. at 1293.

\textsuperscript{212} Id.

\textsuperscript{213} Id. at 1294.
tion of section 3604(a) of the Act.\textsuperscript{214}

Although the Huntington Branch and Arlington Heights perpetuation of segregation tests are procedurally different, they do not produce different results.\textsuperscript{215} In fact, the Huntington Branch court agreed with the Arlington Heights court that plaintiffs are more likely to prevail when they seek to enjoin governmental interference with plans than when they seek to compel the government to build integrated housing.\textsuperscript{216}

3. Proving Discriminatory Effect—The Distinction Between Public and Private Entities

Discriminatory effect claims may turn on whether the defendant is a public or private entity. Most courts do not distinguish between public and private defendants when determining whether a plaintiff has established a prima facie case of discriminatory effect.\textsuperscript{217} However, a recent district court case, Brown v. Artery Organization,\textsuperscript{218} held that this analysis is not appropriate for private defendants.\textsuperscript{219} The Brown opinion reasoned that, unlike public entities, private parties have no duty to integrate and should not be held responsible for individually neutral housing decisions that have an aggregate effect of perpetuating segregation.\textsuperscript{220} The Brown court interpreted the Ar-

\textsuperscript{214} Id.

\textsuperscript{215} See, e.g., Keith v. Volpe, 858 F.2d 467, 483 (9th Cir. 1988) (applying both tests, and finding city liable under each); Resident’s Advisory Bd. v. Rizzo, 564 F.2d 126, 148 n.32 (3d Cir. 1977) (using traditional two-step analysis, but noting that decision would be the same using the Arlington Heights four-factor test), cert. denied, 435 U.S. 908 (1978).

\textsuperscript{216} Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir.), aff’d, 488 U.S. 15 (1988) (per curiam).


\textsuperscript{219} Id. at 1114-16 (requiring a showing that private entity had discriminatory intent in perpetuation of segregation cases). But see United States v. Starrett City Assocs., 840 F.2d 1096, 1100-01 (2d Cir.) (holding that occupancy quotas violate fair Housing Act for both private and state actors), cert. denied, 488 U.S. 946 (1988); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977) (noting that business justification of private entity in perpetuation of segregation claim will be scrutinized more carefully than justifications offered by government entities), cert. denied, 434 U.S. 1025 (1978).

\textsuperscript{220} Brown, 654 F. Supp. at 1115; see supra notes 67-75 (discussing the public vs. private duty to integrate under Title VIII). But cf. Betsey, 736 F.2d at 988 (holding that Arlington Heights multifactor analysis is not appropriate for private defendants, who should be held to more stringent “compelling” business necessity standard). Note that Betsey was a strict disparate impact case. Id.
llington Heights four-factor test as establishing a sliding scale test between discriminatory intent and discriminatory effect; a greater showing of disparate impact will allow a lesser showing of discriminatory motive. 221 However, under the Brown test every action against a private party requires at least some evidence of discriminatory intent. 222

Conversely, once a prima facie case of discriminatory effect is established, some courts appear to place a higher threshold of business necessity on private defendants than on public entities. 223 The Arlington Heights test explicitly requires courts to give greater deference to legitimate governmental actions than to actions protecting private interests, particularly when the action is based on zoning authority. 224 The Fourth Circuit, in Betsey v. Turtle Creek Associates, 225 indicated that the Arlington Heights test was inapplicable to private parties, and that private parties should be required to show a compelling business necessity for their actions. 226 However, whether the justification required by governmental defendants is qualitatively different than the “compelling business necessity” standard is not clear. Courts examining governmental defenses have applied a “least restrictive alternative” standard to them. 227 This, on its face, appears to be as stringent a test as business necessity. 228 Additionally, governmental bodies do not have the same economic interests at stake as private defendants, and government actions have more potential for widespread harm than most private actions. 229 Thus, it can be argued that an even more exacting standard is imposed on governmental bodies to justify actions with a discriminatory impact. 230

222. Id.
223. See infra notes 224-26 and accompanying text.
224. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978). But cf. McCormack, supra note 147, at 580-81 (arguing that public entities should have a stricter burden, because they have regulatory interests that impact on the welfare of the entire community).
225. 736 F.2d 983 (4th Cir. 1984).
226. Id. at 988 n.5.
228. See McCormack, supra note 147, at 602-06 (comparing the business justification standards applied to public as opposed to private defendants).
229. Id. at 604 n.285.
230. Id. at 602. Even the Arlington Heights court, which granted deference to certain govern-
In conclusion, although there is a close analogy between Title VIII and Title VII doctrine, the two standards of review are not mirror images of one another. Courts interpreting the Fair Housing Act have created an independent doctrine with respect to some discriminatory effect claims. In addition, unlike the neutral Title VII, Title VIII differentiates between public and private entities, placing on the former an affirmative duty to integrate. These differences can create uncertainty when analyzing a claim that a benign housing practice discriminates on the basis of race.

E. Applying the Legal Standards to Race-Conscious Programs

Courts analogize to Title VII Supreme Court precedents when analyzing whether race-conscious programs implemented to promote integration violate the Fair Housing Act. In United Steelworkers of America v. Weber, the Supreme Court held that a private employer may voluntarily institute a race-conscious hiring program to ameliorate the effects of its past racial discrimination. However, Weber does not provide a perfect analogy for Title VIII race-conscious programs. The Supreme Court has held that the legislative history of Title VII shows that Congress did not want race-conscious affirmative measures "invoked simply to create a racially balanced workforce." Unlike Title VII, the Fair Housing Act seeks to

mental actions, closely balanced this interest with the level of discriminatory impact caused by the action. The Arlington Heights court held that if no other properly zoned and suitable sites were available, the legitimate governmental interest would be subordinated to the integration goal of the Fair Housing Act. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293-94 (7th Cir. 1977), cert. denied, 434 U.S. 1025.

231. See supra notes 142-49 (discussing how the Title VIII standard of review was derived from Title VII precedent).
232. For instance, there is no perpetuation of segregation claim available under Title VII. SCHWEMM, supra note 15, § 10.2 (4)(C).
233. See supra notes 59-61 and accompanying text (detailing how the language of the Act and accompanying regulations places an affirmative duty on public entities to integrate housing). The language of the Act itself is silent as to any private duty.
234. See infra notes 235-39 and accompanying text (discussing the analogy).
236. Id. In upholding the plan, the Supreme Court noted that it was a voluntary, temporary measure to achieve racial balance, and was not designed to maintain racial balance. Id. at 208-09.
achieve racial balance as well as to end discrimination. Still, courts analyzing race-conscious programs under the Fair Housing Act uniformly rely on Title VII affirmative action standards to support their decisions. Under Title VIII, the legality of race-conscious housing programs depends on how they are categorized.

Categorizing the various race-conscious housing programs is not easy. There is no set terminology for differentiating one plan from another; the language used by one scholar often contradicts that of another scholar. For purposes of this Note, race-conscious plans have been subdivided into three categories: benign quotas, integration incentives, and affirmative marketing plans.

I. The Legality of Benign Quotas

Benign quotas involve government agency or private developer housing assignment plans that limit the entry of racial groups in order to maintain integration. Benign quotas may be characterized as either access quotas or ceiling quotas. Access quotas set aside a certain number of housing units for occupancy by members of a particular racial group. They are designed to ensure that a minimum number of a targeted group is represented in the overall

238. See supra notes 63-66 and accompanying text (discussing the Fair Housing Act's purpose of promoting racial integration in housing).

239. See infra notes 259-63 and accompanying text (discussing the Second Circuit's use of Title VII doctrinal analysis to examine the legality of benign housing quotas).

240. See Lind, supra note 5, at 646-47 (arguing that extent of justified intrusion allowable to meet goal of integration depends on the specific characteristics of the municipality).

241. Compare id. at 610 n.27 (defining "integration maintenance" programs as encouraging voluntary efforts to integrate, as opposed to "integration management," which are programs that limit consumer choice in order to sustain integration) with Berry, supra note 1, at 352 (asserting that integration maintenance allows for manipulation of the housing market to prevent resegregation); and Smolla, supra note 122, at 898 (defining integration maintenance as covering all types of race-conscious programs).

242. See infra notes 245-82 and accompanying text.

243. See infra notes 283-304 and accompanying text.

244. See infra notes 305-53 and accompanying text (discussing in depth affirmative marketing techniques and their legality); see also Smolla, supra note 122, at 898-900. Smolla delineates three approaches to "integration maintenance": (1) quotas or limits on minority entry; (2) encouraging or discouraging entry of racial groups; and (3) race-conscious dispersal of entrants throughout the community. Id.

245. United States v. Starrett City Assocs., 840 F.2d 1096, 1103 (2d Cir.) (holding an occupancy quota illegal because it had a discriminatory effect against blacks), cert. denied, 488 U.S. 946 (1988).

246. Id. at 1104; see Gelber, supra note 104, at 930 (describing the difference between access and ceiling quotas).
population of an area. Ceiling quotas set an upper limit on a targeted group's representation in a neighborhood or community. They are intended to maintain integration by controlling access by members of a group whose presence might lead to tipping.

*United States v. Starrett City Associates* is the seminal case on the issue of whether the use of racial occupancy quotas to combat the threat of tipping is legal under the Fair Housing Act. In *Starrett City*, the Second Circuit invalidated the use of a racial occupancy quota implemented by a private apartment complex developer to maintain racial balance in the complex. Specifically, the Second Circuit categorized the Starrett City occupancy controls as a "ceiling" quota, which has the purpose of maintaining integration, as opposed to an "access" quota, which has the purpose of creating or achieving integration.

The *Starrett City* court found the quota had a significant discriminatory effect on black applicants for the complex. Because the number of black applicants greatly exceeded the number of white applicants, blacks were forced to wait up to eleven times longer than whites for open units. The court equated the extended wait with an illegal "denial" of housing under section 3604(a) of the Fair Housing Act. Utilizing *Johnson v. Transportation Agency* as

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247. *Starrett City*, 840 F.2d at 1102 (citing Otero v. New York Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973)) (upholding housing authority start-up quota implemented at new housing complex to prevent creation of a "pocket ghetto").

248. *Id.* at 1104 (noting that developer of a private apartment complex placed racial occupancy limits of 64% white, 22% black, and 8% hispanic).

249. *Id.* at 1102; *Gelber, supra* note 104, at 930.


251. *Id.*

252. *Id.* at 1098 (noting that the housing complex set an occupancy limit of 64% whites, 22% blacks, and 8% hispanics). The court noted that "[w]hile quotas promote Title VIII's integration policy, they contravene its anti-discriminatory policy." *Id.* at 1101. Federal district courts had previously held that this type of quota was illegal under Title VIII. *Burney v. Housing Auth.*, 551 F. Supp. 746 (W.D. Pa. 1982) (rejecting system in which new applicants and transfer applicants in public housing project were given priority based on whether their race would help maintain a two-to-one black/white ratio); *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980) (same regarding permanent apartment complex occupancy quota of 75% white, 20% hispanic, and 5% black).

253. *Starrett City*, 840 F.2d at 1101-02. The *Starrett City* court stated that not every denial, especially a temporary denial, of low-income public housing has a discriminatory impact on minorities. Title VIII does not proscribe all race-conscious programs. *Id.* at 1100.

254. *Id.*

255. *Id.* at 1099. Starrett City's active file was 21.9% white in October of 1985, but whites occupied 64.7% of the apartments in January of 1984. Blacks comprised 53% of the active file, but only occupied 20.8% of the apartments. *Id.*

256. *Id.* at 1100.
precedent for analyzing the business necessity defense for race-conscious programs, the Starrett City court ruled as insufficient the developer's defense that the occupancy quota was necessary to prevent racial tipping.258

Relying on Johnson, the Second Circuit reasoned that the use of race-conscious plans must be based on some history of prior discrimination or racial imbalance within the entity seeking to use them.259 It also reasoned that plans "employing racial distinctions must be temporary in nature with a defined goal as its termination point."260 The Second Circuit held that the occupancy quotas imposed by the developers did not meet these requirements. The court noted that the housing complex had never previously discriminated, the developers' avowed purpose in implementing the quota was to permanently maintain integration, and there was no definite termination date.261 Thus, the Second Circuit concluded, regardless of whether Starrett City was a private entity or a state actor, its occupancy controls illegally denied housing to minorities under the Fair Housing Act.262

The Second Circuit distinguished the factual situation in Starrett City from that in Otero v. New York City Housing Authority,263 where the Second Circuit upheld a public housing authority's occu-

258. Starrett City, 840 F.2d at 1101-02. A housing expert had estimated the tipping point of Starrett City at 40%; another expert found that a two-to-one white-to-minority ratio produced stable integration. Id. at 1099; see supra note 138 (discussing the difficulty in measuring a precise tipping point).
259. Starrett City, 840 F.2d at 1102; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plurality) (maintaining that societal discrimination alone is an insufficient basis for adopting "benign" practices with discriminatory effects).
260. Starrett City, 840 F.2d at 1101; see Wygant, 476 U.S. at 276 (requiring that a race conscious plan not be "ageless in [its] reach into the past, and timeless in [its] ability to affect the future").
261. Starrett City, 840 F.2d at 1102-03.
262. Id. at 1101-03. The dissent disagreed with this holding, and argued that the plan was narrowly tailored to achieve its goal of integration, particularly in light of the fact that prior efforts to maintain integration in the complex through affirmative advertising had failed. Id. at 1106 (Newman, J., dissenting). Judge Newman asserted that where private property is concerned, a policy choice to maintain integration through quotas is a policy choice that should be left up to the individual. Id. at 1108 (Newman, J., dissenting).

Judge Newman also argued that the plan should be upheld because HUD gave approval when it was originally conceived by the developer five years prior to the suit. Id. at 1104 (Newman, J., dissenting). But see United States v. Charlottesville Redev. & Hous. Auth., 718 F. Supp. 461, 464 (W.D. Va. 1989) (holding that courts do not have to defer to HUD administrative approval of racial quotas; mere letters of approval carry insufficient weight, and HUD has no power to excuse discriminatory acts).
263. 484 F.2d 1122 (2d Cir. 1973).
pancy quota that adversely impacted minorities. In Otero, the housing authority had cleared a predominantly black area for urban renewal. Former site residents were promised priority in the new development. However, to prevent tipping, the housing authority subsequently set aside 50% of the new units for nonsite residents, 88% of whom were white. The Otero court held that the quota was legal under section 3608(d)(5) of the Fair Housing Act, reasoning that despite its discriminatory effect on minorities the quota was essential to achieving racial balance in the project and preserving the integrated status of adjacent neighborhoods.

The Starrett City court observed that, unlike the quota imposed by Starrett City Associates, the quota in Otero applied only to the initial start-up occupancy of the new housing complex. The court observed that the Otero quota would end once the complex was initially occupied; it was not a continuing limitation on access like the quota imposed by the Starrett City complex. Since the plan in Otero had the purpose of achieving integration rather than maintaining integration, it constituted a permissible “access” quota under Johnson and Wygant.

Professor Schwemm argues that the real distinction between the Starrett City and Otero plans did not turn on the duration of the plans or whether they were designed to “achieve” as opposed to “maintain” integration. Instead, Schwemm points out that the quota in Otero was upheld on the basis that the defendant was a public entity and thus had an affirmative duty to integrate pursuant

264. Id.
265. Id. at 1125-29.
266. Id. at 1128.
267. Id. at 1133-34. Otero held that the defendant must submit convincing evidence that color-blind adherence would almost certainly lead to eventual destruction of racial integration existing in the community. Otherwise, the denial of housing would constitute illegal discrimination on the basis of race. Id. The court held there was convincing evidence that allowing priority access to former site residents would create a pocket ghetto and endanger the integrated status of adjacent neighborhoods. Id. at 1135.

A district court imposed an access quota in Young v. Pierce, 685 F. Supp. 975 (E.D. Tex. 1988). The court required HUD, pursuant to a finding that HUD maintained racially segregated housing, to implement a tenant assignment plan in all low-income housing to achieve integration. Id. at 978.

269. Id.
270. Id.
to section 3608(e)(5) of the Act.\textsuperscript{272} In contrast, the defendant in \textit{Starrett City} was a private entity and had no duty to integrate. However, the reasoning in \textit{Starrett City} was followed the next year in \textit{United States v. Charlottesville Housing & Redevelopment Authority},\textsuperscript{273} a case involving a racial quota implemented by a public housing authority.\textsuperscript{274} The \textit{Charlottesville} court held that where there is a conflict between the Act’s dual purposes, the duty to avoid discrimination must trump the obligation of the housing authority to promote integration.\textsuperscript{275} The district court reasoned that a racial occupancy quota seeking to maintain a 50/50 racial balance was not a narrowly tailored remedy for past discrimination because it was not “circumscribed in its effect on innocent parties.”\textsuperscript{276}

Community-wide racial quotas have also come under legal attack. After legal action was threatened, the city of Oak Park, Illinois, rescinded a proposed ordinance prohibiting any seller or broker from knowingly selling real property to a black person if over 30% of that block was black.\textsuperscript{277} A Cleveland Heights, Ohio, resolution designed to freeze integration at a 75:25 white-to-black ratio by steering blacks away from the market was also challenged in court.\textsuperscript{278}

In summary, Title VIII permits racial occupancy controls only when they have the purpose of \textit{achieving} racial balance.\textsuperscript{279} Courts have uniformly held occupancy quotas illegal when they seek to maintain integration.\textsuperscript{280} Although the quotas are easy to administer,

\begin{itemize}
\item \textsuperscript{272} \textit{Id.} at 11-19.
\item \textsuperscript{273} 718 F. Supp. 461 (W.D. Va. 1989).
\item \textsuperscript{274} \textit{Id.}
\item \textsuperscript{275} \textit{Id.} at 468.
\item \textsuperscript{276} \textit{Id.} at 470-71.
\item \textsuperscript{277} See Vodar, \textit{supra} note 67, at 165-66 (noting that the plan was not designed to remedy past discrimination); \textit{Oak Park Board of Trustees, Preliminary Draft Outline of the Oak Park, IL. Community Plan for Racial Integration} 14-18 (May 20, 1974) (discussing the efficacy of various integration plans). In addition, Oak Park’s 1968 Fair Housing Ordinance prohibited differential treatment based on race, but exempted certain locations, buildings, and transactions from prosecution if a reasonable plan to prevent or eliminate de facto segregation was submitted to, and approved by the city’s Community Relations Commission. This clause “in effect legitimized an informal quota system at the discretion of the [Commission].” \textit{Berry, supra} note 1, at 282-83.
\item \textsuperscript{278} Smith \textit{v. Cleveland Heights}, 760 F.2d 720 (6th Cir. 1985). The decision only involved standing to sue; the Sixth Circuit did not reach the merits of the case. The court ruled that an allegation of stigmatic harm flowing from such a community-wide racial quota is enough for standing if the plaintiff lived in the community. \textit{Id.} at 722-23.
\item \textsuperscript{279} Otero \textit{v. New York City Hous. Auth.}, 484 F.2d 1122 (2d Cir. 1973).
\item \textsuperscript{280} See \textit{supra} notes 251-77 and accompanying text (discussing the legality of ceiling quotas).
\end{itemize}
and they effectively promote the Fair Housing Act's goal of integration, they do so at the unacceptable cost of limiting the free housing choice of minorities.

2. The Legality of Pro-Integration Incentives

Pro-integration incentives usually involve government agencies or municipalities offering economic aid or other types of incentives to encourage integrative housing choices. Proponents of the use of pro-integration incentives argue that, unlike occupancy quotas, eligibility is determined not by the race of the housing customer, but by the purchaser's choice to make an integrative move. This type of race-conscious tactic is especially popular in the Chicago and Cleveland metropolitan areas. For instance, the Chicago suburb of Oak Park, Illinois, instituted a program providing matching rehabilitation funds for landlords undertaking integrative efforts.

281. Polikoff, supra note 77, at 12 (stating that ceiling quotas are attractive because they immediately ease whites' fear of tipping by ensuring whites are the dominant percentage).

282. United States v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir.), cert. denied, 488 U.S. 946 (1988); see Yinger, supra note 136, at 303-05. Yinger argues that ceiling quotas increase black demand for housing in other areas and thus may hasten racial transition in those areas as well as boost the price minorities have to pay for this alternative housing. Yinger asserts that one way to avoid the temptation to use ceiling quotas is to ensure whites do not have all white enclaves to which they can flee. Id.

283. See infra notes 285-90 and accompanying text (detailing various types of pro-integration incentives).


285. Id. at 4 (statement of Alexander Polikoff) (calling these metro areas "outstanding examples" of communities overtly working to foster racial diversity). Milwaukee, Wisconsin, has also instituted pro-integration incentives to meet a consent decree ordering Milwaukee to desegregate its school system. Soja A. Thomas, Comment, Efforts To Integrate Housing: The Legality of Mortgage-Incentive Programs, 66 N.Y.U. L. REV. 940, 948-49 (1991).

286. See Gelber, supra note 104, at 937 (discussing Oak Park matching fund ordinance). The Oak Park ordinance pays landlords matching funds of $1000 per unit to rehabilitate rental units. In return for the funds, landlords must agree to allow the Oak Park Housing Center to serve as their rental agent. Id. The Housing Center affirmatively markets the property and encourages integrative moves. Landlords must allow the housing Center 120 days to rent the property; if the unit is vacant more than one month, landlords are given an 80% rent subsidy for the next 90 days. Id.

The ordinance was implemented to combat the threat of racial tipping on the city's east side. At the time, of Oak Park's 563 apartment buildings, 63 were all black, 58 of them on the east side. Charlie Cooper, Plan To Integrate Apartments, OAK LEAVES, Aug. 1, 1984, at 3; accord OAK LEAVES, Nov. 7, 1984, at 3; OAK LEAVES, Aug. 1, 1984, at 18.

For an excellent discussion of government and private efforts to maintain racial integration in Oak Park, see Berry, supra note 1, at 277-303. These efforts were spurred by the rapid racial transition of the adjacent Austin neighborhood of Chicago, which, through block-by-block racial succession, changed the racial makeup of Austin from predominantly white to predominantly
also implemented an equity assurance program to protect the property values of homeowners living in integrated neighborhoods.\textsuperscript{287} The Cleveland metropolitan area has pioneered the use of mortgage assistance and subsidized loans to induce persons to make integrative moves.\textsuperscript{288} In addition, a Boston housing authority gave housing applicants willing to make integrative housing choices priority on its waiting list.\textsuperscript{289}

There has been little scholarly debate over pro-integration incentives to date,\textsuperscript{290} and litigation involving their use is rare, particularly

black at a rate of two city blocks per year from 1965 to 1970. \textit{Id.} at 285. This black expansion threatened to completely envelop the east side of Oak Park. Oak Park's black population rose from 57 to 720 residents from 1965 to 1970, with most of them concentrated on the east side. \textit{Id.} at 279-83.

287. \textit{See} Maureen A. McNamara, Comment, \textit{The Legality and Efficacy of Homeowners Equity Assurance: A Study of Oak Park, Illinois}, 78 \textit{Nw. U. L. Rev.} 1463, 1466 (1984) (discussing the Oak Park equity assurance ordinance). The ordinance acts as a method to prevent white flight, seeking to counter the threat of blockbusting and accompanying declines in property values. The municipality guarantees the equity value of a home at the time a resident joins the program, and reimburses him for any decline. The theory is that if the city guards against risk of declining property values, residents will be encouraged to remain, property values will stabilize, and the integrated housing market will continue. \textit{Id.} The program is paid for by a special property tax assessment. \textit{Fair Housing Hearings, supra} note 15, at 25 (statement of Alexander Polikoff).

288. \textit{See} \textit{Yale Conference, supra} note 100, at 94 (statement of Donald DeMarco) (noting that the community of Shaker Heights, Ohio, affirmatively encourages integration by providing subsidized mortgages to persons wishing to make integrative moves); \textit{see also} MORRIS MILGRAM, \textit{GOOD NEIGHBORHOOD: THE CHALLENGE OF OPEN HOUSING} 95-100 (1977). Milgram details the efforts of housing councils in Shaker Heights and Cleveland Heights, Ohio to maintain integration in their communities during the late 1970s. He notes that the Shaker Heights integration incentives also provided for deferred payment on the subsidized mortgages. \textit{Id.}

Efforts to promote integration in the Cleveland suburbs involve a partnership of cities, schools and organizations in the private sector, including the largest private real estate corporation in the state of Ohio. \textit{Fair Housing Hearings, supra} note 15, at 105-11 (statement of Winston H. Richie). The Ohio Housing Finance Center involves proceeds from a government bond issue that are set aside for subsidizing integrative moves on a metropolitan wide basis. \textit{Id.; see also id.} at 144 (statement of Robert D. Butters) (reciting a statistical breakdown of eligibility for incentives based on racial group). Both the East Suburban Housing Fund (Cleveland) and the Fund for the Future of Shaker Heights (Ohio) involve private organizations combining low-interest second mortgage loan and housing counseling. \textit{Id.} at 40-41 (statement of Alexander Polikoff).


290. \textit{Fair Housing Hearing, supra} note 15, at 50-51 (testimony of Alexander Polikoff) (noting that although the purpose of pro-integration financial incentives is identical to that of affirmative marketing, incentives have not been subject to comparable legal and policy debate). Robert D. Butters, Chairman of the National Association of Realtors, has criticize pro-integration incentives as not expanding housing choice. He argues that these plans are actually an attempt to create and maintain a racial balance, and since incentives usually operate in already integrated areas, minority home seekers have significantly less than the total universe of homes available to them when seeking subsidized financing. \textit{Id.} at 189 (statement of Robert D. Butters). Butters also accused wide-scale use of financial incentives as promoting "steering" by real estate agents. He argues that (1) discounted financing makes pro-integrative sales easier to close than "normal" housing transactions, (2) agents are obligated to secure the highest ice for the seller, and (3)
with respect to the use of financial incentives. The most important case in this area is *Schmidt v. Boston Housing Authority*, where a district court upheld a HUD tenant assignment plan that accorded priority to applicants choosing to be housed in a development in which their race was a substantial minority. The court ruled that the plan did not deny housing to any person because it still provided for freedom of housing choice. Applicants desiring to live in a complex where their race was in the majority could do so; they merely faced a longer wait. The *Schmidt* court found that the plan did not have any discriminatory effect on minorities; the proportion of black applicants to white applicants was not significantly higher, thus there was no significantly longer waiting period for minorities.

Financial incentive programs have not been directly challenged in court under the Fair Housing Act. However, some scholars feel that these types of programs violate the Fair Housing Act because they have the practical effect of deflecting some minority entry into the community. Pro-integration incentives are also criticized as pushing pro-integrative housing choices will make it easier for the agent to meet that duty, since the lower financing enables the seller to ask a higher price as an offset. *Id.* at 144 (statement of Robert D. Butters). Pro-integration plans are also perceived as acting as a de facto occupancy quota, since they often trigger at a predetermined integration "goal." *Id.* at 113-14 (testimony of Winston H. Richie); *see also* Thomas, *supra* note 285, at 955-67 (arguing that incentive plans that determine eligibility based on a percentage goal for any particular racial group (i.e., 60% black-40% white) may constitute impermissible use of racial criteria). Thomas favors language-neutral incentives, where pro-integrative moves are defined as those moves to areas where the applicants' race is at least 15% less than the metro average, or moves to transition areas, where over a five-year period the applicants' racial percentage has dropped at least 10%. *Id.* at 972.

291. *See infra* notes 293-97 (discussing a case involving waiting list priority where financial incentives were not at issue).


293. *Id.* at 991-92.

294. *Id.* at 995; *see Fair Housing Hearing Hearings, supra* note 15, at 65 (statement of George G. Calster, Professor of Economics, Wooster College) (asserting that the *Schmidt* plan is clearly facially neutral because both whites and nonwhites can be classified as minority preference applicants depending on the development chosen). *But see* Thomas, *supra* note 286, at 972 (arguing that the *Schmidt* plan is very similar to the occupancy quota plan invalidated in *Burney v. Housing Authority*, 551 F. Supp. 746 (W.D. Pa. 1981)). *See supra* note 252 (discussing facts of *Burney*).


296. *Id.* at 993-96.


298. *See* Smolla, *supra* note 84, at 999 (arguing that the equity assurance plan is unconstitutional). Smolla asserts that it is doubtful that housing just as cheap and convenient is in fact available for every prospective minority entrant in currently all-white neighborhoods. Thus, the
discriminatory because the current economic status of blacks makes it much more difficult for them to take advantage of the incentives. 299

HUD has remained officially neutral on the legality of pro-integration incentives. 300 After Congress passed the 1988 amendments to the Fair Housing Act, HUD published proposed rules and illustrations interpreting the Act. 301 However, during the thirty-day public comment period, many people argued that some illustrations had the effect of disallowing certain pro-integrative practices, such as subsidized loans. 302 HUD declined to incorporate the illustrations into its permanent regulations, opting instead to wait for Congressional direction in this area. 303 In summary, pro-integration incentives are in a state of flux. They are the subject of little present attention by the courts, but they have recently been heavily criticized by scholars and community activists as discriminating against minorities in much the same way as racial quotas do. 304

3. The Legality of Affirmative Marketing Efforts

Affirmative marketing has been a mainstay of fair housing efforts

practical effect of integration incentives will be to discourage some black entry. Id.; see also YALE CONFERENCE, supra note 100, at 95 (statement of Robert Ellickson) (arguing that equity assurance plans are ineffective because they address symptoms of short run panic as opposed to the disease of deep-seated prejudice).

299. See Thomas, supra note 285, at 967 n.220. Thomas notes that a recent study of the Shaker Heights, Ohio, incentive program shows that it is effectively directed towards maintaining white demand. Out of seventy-nine subsidized loans made under the program in 1990, only four went to blacks. Thomas attributes this to the fact that integrated areas have more modest housing stock than predominantly white areas. Thus, it is easier to meet the economic requirements of a house purchase in an integrated neighborhood. Under the pro-integration incentives, only white buyers would qualify for a subsidized move to an integrated neighborhood. Id.; see also Wilkerson, supra note 103, at A1 (noting that few blacks can afford to make integrative moves into the all-white areas of Shaker Heights, where most neighborhoods are "leafy mansion districts"). Wilkerson notes that to offset the problem of minority entry into Shaker Heights, the city funnels loans to blacks willing, and financially able, to move into an adjacent ring of all-white suburbs. Id.

300. See infra notes 302-05 and accompanying text (discussing HUD position on pro-integration incentives).


302. See Preamble to Final Rule Implementing Fair Housing Amendments Act of 1988, 24 C.F.R. ch. 1, subch. A, app. I, at 690-91 (1989) (1991 ed.) [hereinafter HUD Preamble] (listing the various regulations that had been altered or removed to avoid the impression that HUD approved or disapproved of certain incentive practices). One example of a removed section was section 100.130(b)(1), which prohibited the use of "different qualification requirements, processing procedures or evaluation standards in accepting applications or in approving loans and other financial assistance for dwellings." 53 Fed. Reg. 45,027-28 (1988).

303. HUD Preamble, supra note 302, at 690.

304. See supra notes 294, 299 (discussing criticism of pro-integration financial incentives).
since the Fair Housing Act was passed in 1968. What affirmative marketing constitutes is susceptible to different interpretations. Realtors, for example, often interpret affirmative marketing as applying only to minorities, and only for the purpose of opening previously segregated areas. However, courts have recently interpreted affirmative marketing efforts as serving the much broader goal of promoting stable housing integration. The court in Steptoe v. Beverly Area Planning Association recently characterized affirmative marketing as follows:

Affirmative marketing . . . aims to attract and influence housing consumers and providers in a manner favorable to residential integration. The consumer may indeed choose not use [sic] a housing service and yet is not cut off from buying or renting dwellings . . . . While a municipality may allocate its informational services to take into account racially discriminatory conditions in the housing market, affirmatively marketing its service does not limit or close off the number of homes for sale or apartments for rent in the private market.

Affirmative marketing plans "seek to level the informational playing field" by encouraging the entry of underrepresented racial groups to a community and making special outreach efforts to these groups. The goal is to promote more racially diverse demand for housing in transitional areas, and thus better maintain stable integration. Some scholars and minority organizations strongly object to affirmative marketing programs, accusing them of constituting "reverse steering" that limits the free housing choice of minorities in violation of the Fair Housing Act. They argue that communities

305. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1075 (N.D. Ill. 1988) (discussing voluntary affirmative marketing agreement between HUD and the National Association of Realtors; the agreement defined affirmative marketing as justifying only remedial special outreach efforts), aff'd in part and reversed in part, 935 F.2d 868 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992); see supra notes 98-99 (noting that early realtor affirmative marketing agreements were designed to end discrimination, and not necessarily to promote integration).

306. See infra notes 308-11 and accompanying text.
308. Id. at 1319-20 n.9 (quoting Lind, supra note 5, at 639-40, 642).
309. YALE CONFERENCE, supra note 100, at 123.
310. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1085 (N.D. Ill. 1988), aff'd in part and rev'd in part, 935 F.2d 868 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992); see Fair Housing Hearings, supra note 15, at 118 (statement of Alexander Polikoff) (asserting that the intended effect of affirmative marketing is to redress the situation where a portion of the market is not working, not to assure a particular occupancy).
311. YALE CONFERENCE, supra note 100, at 122 (remarks of Peter Flemister) (maintaining that affirmative marketing is similar to racial quotas in that both reach out to everyone except minorities); Fair Housing Hearings, supra note 15, at 144 (testimony of Robert D. Butters) (ar-
engaging in affirmative marketing further racial stereotypes by implicitly saying that a black minority is a "social pollutant that has to be diluted." But see id. at 88 (testimony of George C. Calster) (asserting that affirmative marketing does not constitute steering for five reasons: (1) it involves voluntary home seeker choice; (2) the plans are explicit in their intent; (3) the plans are evenhanded, including all races of home seekers; (4) the plans expand the range of housing choices; and (5) the plans have a desegregative effect).

312. Housing Ruling Reaction Divided; Does it Help or Hurt Integration, CHI. TRIB., Dec. 25, 1988, § 2, at 1 [hereinafter Housing Ruling] (reporting fair housing commentators' views).

313. See Jerry Shnay & Linda P. Campbell, Court OK's Race-Based Housing, CHI. TRIB., Jan 28, 1992, § 1, at 1 (reporting views of fair housing commentators).

314. See SCHWEMM, supra note 15, § 11.2(2)(b), at 11-10; Reply Brief for Appellant at 13, South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991) (Nos. 89-2122, 89-2777) (citing trial transcript and noting that over two thousand affirmative marketing agreements were entered into in Illinois during the last ten years).


317. See infra notes 319-53 and accompanying text.


319. See supra notes 66-68 and accompanying text (discussing the scope and extent of obligations imposed on public entities by § 3608(e)(5) of the Fair Housing Act).
assistance to make special outreach efforts to groups that normally would not be expected to seek housing because of economic or other considerations.\(^3\) The Supreme Court has held that HUD's interpretation of the Fair Housing Act "ordinarily commands considerable deference."\(^4\) This deference is an important factor in the approval courts give to government-sponsored affirmative marketing programs.\(^5\)

HUD has also published various handbooks directing HUD participants on how to properly formulate an affirmative marketing plan.\(^6\) HUD delineates a two-step process.\(^7\) First, the entity must identify the population segments least likely to apply for housing without special outreach efforts, taking into account neighborhood customs, price, discrimination, and other factors that have the effect of denying housing choice.\(^8\) Second, the entity must develop an outreach program designed to reach those segments identified as least likely to apply.\(^9\)

*Almonte v. Pierce*\(^10\) illustrates the legal issues surrounding the formulation of an affirmative marketing plan by a public entity. The case involved a claim by Hispanics that a public housing project wrongfully failed to identify them as a group eligible for special out-

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320. See 24 C.F.R § 200.600 to .640 (1991) (establishing that entities receiving federal aid for housing projects have an affirmative duty to make special outreach efforts to underrepresented racial groups); Id. §§ 880.601(a), 881.601(a) (1991) (establishing that builders receiving subsidized construction loans or other aid must make special outreach efforts to underrepresented racial groups).


322. See SCHWEMM, supra note 15, § 11.2(2)(e), at 11-27 (arguing that § 3608(e)(5) of the Fair Housing Act limits the scope of affirmative marketing efforts available to private entities).


325. Id.

326. Id. The 1973 edition of the handbook indicated that "[f]or housing located in predominantly white areas, it will normally be necessary to make special efforts to make its availability known to minorities; similarly, for housing in areas of minority concentration, special efforts may be needed to make its availability known to whites." Id. at 521-22 (citing to the 1975 version of the HUD handbook).

reach efforts. The housing authority had made special advertising efforts in white media for a new public housing project, but chose not to advertise in Spanish language media. The district court rejected the claim that this action illegally discriminated against Hispanics by making housing otherwise unavailable in violation of section 3604(a) of the Fair Housing Act. The court reasoned that in the area of the city where the project was located, Hispanics were twice as likely to fall below the poverty line as non-Hispanics, and thus meet the income eligibility requirements for the project. The significant numbers of eligible Hispanics showed that the private developer was correct in not identifying them "as individuals least likely to apply." Therefore, the court ruled, the statistics were fatal to a claim of discriminatory effect.

An unanswered issue in government-sponsored affirmative marketing is whether local communities can require private entities to undertake affirmative marketing activities. The community of Park Forest South, Illinois (now renamed University Park) adopted such an ordinance, which required realtors to encourage entry of racial groups underrepresented in the community as compared to the group's overall representation in the Chicago metropolitan area. However, the village rescinded the ordinance after an administrative complaint challenging it was filed with HUD. Thus, although private entities may be required to promulgate affirmative marketing plans by virtue of participating in federally sponsored housing programs, it is unclear whether the Fair Housing Act also allows state and locally sponsored housing programs to require

328. Id.
329. Id. at 520.
330. Id. at 527.
331. Id. at 528.
332. Id. at 529.
333. Id. at 528.
334. See infra notes 336-38 and accompanying text.
335. See Smolla, supra note 122, at 899 (discussing Park Forest South ordinance and also noting that since blacks constituted 25% of the community, but only 20% of the Chicago metropolitan area, the effect of the ordinance would compel real estate brokers to encourage whites, and not blacks, to move to Park Forest South).
336. Arquilla-DeHaan Realtors v. Village of Country Club Hills, No. 80 C 2070 (N.D. Ill. Oct. 31, 1980); see also Milgram, supra note 288, at 97-98. Milgram discusses a Cleveland Heights, Ohio ordinance targeting a 75:25 white-black racial balance in the city. Milgram notes that to achieve this balance, information about certain properties within the city was sometimes deliberately withheld from persons based on their race in order not to upset the target racial balance. Milgram asserts that these efforts presented a blatant example of steering. Id.
337. See supra note 321 (discussing HUD participation requirements).
affirmative marketing from their participants.

b. Privately sponsored affirmative marketing programs

The language of the Fair Housing Act does not give private entities an affirmative mandate to integrate. HUD regulations also lack any discussion of whether private groups may engage in affirmative marketing. However, the preamble to the regulations states that "nothing in the Amendments to the Fair Housing Act or their legislative history would support a conclusion that Congress sought to make choice-broadening activities such as the Department’s Affirmative Fair Housing Marketing Program, unlawful discriminatory housing practices." The preamble states that these activities would run afoul of the Act only if they resulted in "choice limitations." A recent HUD notice suggests that efforts by for-profit groups, such as realtors, may be viewed less favorably than efforts by nonprofit groups such as fair housing organizations. Real estate brokers, unlike fair housing organizations, play a central role in the real estate transaction, and their actions can more readily restrict housing.

The legality of nonprofit fair housing counseling efforts was recently examined in *Steptoe v. Beverly Area Planning Association*. The *Steptoe* court upheld a private housing council plan that provided housing information only to people who wanted to make non-traditional housing moves. These nontraditional moves included

338. See supra notes 66-68 (noting that § 3608(e)(5) places duty to integrate only on public entities).
339. HUD Preamble, supra note 302, at 689-90.
340. Id. at 690. The Preamble further notes that these activities "promote greater opportunities for persons to participate in ... housing programs" and are designed to "make available information that broadens housing choices for persons." Id.
341. Id.; cf. Fair Housing Advertising; Scope, 24 C.F.R. § 109.16(b) (1991) (requiring that regulations prohibiting certain types of advertising activities "shall not be construed to restrict" advertising pursuant to an affirmative marketing program).
342. See Recognition of Substantially Equivalent Laws, 53 Fed. Reg. 26,318 (1988) (giving HUD recognition and approval to a Hazel Crest, Illinois, fair housing ordinance, stating that "nothing in this section shall be construed to prohibit special outreach efforts conducted by units of local government or non-profit fair housing agencies").
343. Fair Housing Hearings, supra note 15, at 188 (statement of Alexander Polikoff). Unlike realtors, the bulk of municipalities and housing centers engaged in affirmative marketing do not own or control the housing stock. Id. at 188-89. Polikoff observes, in contrast, that brokers are involved in the actual mechanics of buying property; they suggest homes to be shown or not shown. Thus, Polikoff asserts, realtors may more easily make housing unavailable. Id.
345. Id. at 1315-16 (the justification for the program by the goal of preventing tipping).
black customers moving to predominantly white neighborhoods, or white customers moving to integrated neighborhoods. The district court rejected a claim that this practice constituted illegal steering, noting that the council's practice of fully informing all customers of their policy avoided this danger. The court also reasoned that the council did not directly participate in real estate transactions but rather only supplemented normal real estate marketing channels. Thus, the council did not "otherwise make unavailable" or deny housing to customers in violation of section 3604(a) of the Fair Housing Act.

In addition to purely private affirmative marketing efforts, there is also a notable example of a cooperative race-conscious marketing effort between a local government and a private housing organization. In Oak Park, eighty percent of the 10,600 rental units in the Village are listed with the Oak Park Housing Center ("Center"), a fair housing agency supported both by private grants and Village appropriations. The Center counsels residents, real estate agents, prospective renters, and home buyers on the merits of making integrative moves, particularly when a neighborhood is attracting a disproportionate number of blacks. This cooperative effort in Oak Park has not been directly challenged under the Fair Housing Act. Nevertheless, the reaction to the Park Forest South ordinance illustrates the intense debate engendered by the use of affirmative marketing techniques by both public and private entities. The fact that

346. Id. at 1315.
347. Id. at 1316. The Housing Council was not affiliated with the real estate industry and was not involved in the sale, rental, or transfer of real estate. Id.
348. Id. at 1320; see also Lind, supra note 5, at 640 nn. 187-88 (noting that realtors opposing affirmative marketing accuse it of functioning as steering, and that steering is illegal regardless of its effect). Lind also notes there is disagreement as to what is illegal—the act of influencing itself, or influencing so as to effect a predictable, segregative effect. Id.
Affirmative marketing plans are not without burdens, especially those plans focusing solely on integrated neighborhoods, because their services are restricted solely to whites. But, "to the extent that such services do not supplant the traditional real estate market," such burdens are unlikely to override the programs' important statutory objectives. Gelber, supra note 104, at 958-59; see also Note, supra note 105, at 955 (advocating affirmative marketing but warning that if benign steering becomes pervasive in society, blacks will have no alternative but to live in a community with a white majority).
349. Steptoe, 674 F. Supp. at 1319 (noting that information needed to make traditional moves was readily available through other sources).
350. Brenda Wilhelmson, Renter-Friendly Village; Oak Park Center Dedicated to Apartments, Racial Unity, Chi. Trib., Apr. 27, 1990 (Your place), at 37.
351. Id.; Gelber, supra note 104, at 937-38; Firstman, supra note 101, at 8-9.
Park Forest South rescinded its ordinance before its legality under Title VIII was determined also reflects the fear that some affirmative marketing activities may expose their proponents to legal liability.352 Left unanswered is the issue of whether all affirmative marketing efforts can always successfully thread the tension between Title VIII's dual goals of promoting integration and preventing discrimination.

The following section of this Note discusses the Seventh Circuit's recent decision in South-Suburban Housing Center v. Greater South Suburban Board of Realtors,353 and analyzes its effort to resolve some of these unanswered questions surrounding race-conscious integration programs.

II. SUBJECT OPINION: SOUTH SUBURBAN-HOUSING CENTER V. GREATER SOUTH SUBURBAN BOARD OF REALTORS

This case deals with the legality of private and community efforts to maintain racial balance in the community of Park Forest, Illinois. The controversy in South-Suburban Housing Center v. Greater South Suburban Board of Realtors354 arose over the propriety of the South-Suburban Housing Center ("Housing Center") making special efforts to market houses in black neighborhoods to white home buyers.355 Park Forest was developed as a planned community by American Community Builders.356 Since its incorporation in 1949, Park Forest has actively encouraged open housing throughout its community.357 The community developed a cooperative network between government agencies and private groups, including the real estate industry, to help maintain racial balance within its borders.358 These efforts at integration maintenance included public relations efforts, housing counseling, and promotion of commercial develop-
ment. The affirmative marketing activities giving rise to the South-Suburban Housing Center litigation developed as a response to rapid racial turnover in a Chicago Heights neighborhood bordering Park Forest. This rapid racial transition in turn threatened stable integration within Park Forest.

A. Facts and Early Procedural History

During the early 1970s, many blacks moved into the Apache Street neighborhood in Park Forest, Illinois. By the 1980 census, the block was fifty-six percent black, and there was little white demand for housing in the neighborhood. The lack of white demand was exacerbated by mortgage foreclosures on the street, which resulted in abandoned homes and a blighted appearance. To combat

359. Id.; see Berry, supra note 1, at 372. During the 1960s, the local government and real estate brokers within Park Forest also attempted to maintain a stable racial balance by scattering incoming black home buyers throughout the community, thus avoiding clustering of blacks within a neighborhood. This was accomplished through race dispersal lists provided by the village Human Relations Committee. These lists allowed the village to manipulate and control the locations of black families moving into the community. Id. at 370-73. This type of activity was eventually prohibited by the 1973 Park Forest Fair Housing Ordinance, which prohibited the "'steering of majority and minority home buyers or tenants to, from or within Park Forest.'" Id. at 372 (quoting the village ordinance).

360. Berry, supra note 1, at 356-69. In 1970, a national construction company began to develop the Forest Heights area adjacent to the Eastgate subdivision with low cost homes. Id. at 356. These homes were advertised primarily in black media, and attracted numerous inner-city blacks who saw the development as a chance to escape from the urban ghetto. Id. The resulting influx of blacks strained the existing school system, forcing busing of black children into Eastgate neighborhood schools. The Beacon Hill school, located within the Forest Heights neighborhood, changed from 25% black to 90% black during 1970 to 1971, which contributed to white flight from the neighborhoods adjacent to Forest Heights. Id. at 360.


362. South-Suburban Hous. Ctr., 935 F.2d at 873. In comparison to the racial makeup of Apache Street, the percentage of blacks in the Village of Park Forest was 17% as of the 1980 census. South-Suburban Hous. Ctr., 713 F. Supp. at 1083. The Apache Street census block had more than double the black population of any other census block in the subdivision in which it was located. South-Suburban Hous. Ctr., 935 F.2d at 873.

363. South-Suburban Hous. Ctr., 935 F.2d at 873. The fact that many inner-city blacks lived in the Eastgate-Forest Heights area, as opposed to blacks from higher socioeconomic backgrounds, contributed to the high rate of foreclosures. Many families were comprised solely of women and children, and for most of them "the transition was from a high-rise slum to a one-family house
this problem, the Village of Park Forest began to purchase vacant or abandoned homes in order to rehabilitate and resell them. The South-Suburban Housing Center, a private, not-for-profit group, then contracted with the Village to buy, rehabilitate, and then resell three of the vacant properties located on Apache Street. The contract stipulated that the Housing Center would use affirmative marketing efforts to resell the properties.

The Housing Center listed the properties with a local Century 21 real estate agent. As part of the listing agreement, the agent's commission depended on his making certain special outreach efforts to potential white buyers. These efforts included (1) placement of advertisements in newspapers with a predominantly white circulation, (2) distribution of information in selected rental developments, and (3) distribution of information to selected employers. Century 21 then submitted the listings to the multiple listing service operated by the Greater South Suburban Board of Realtors ("Board of Realtors" or "Board"). The Board subsequently withdrew the Apache Street properties from its service, asserting that the plan discriminated against minorities. This multiple listing service included properties and real estate brokers throughout the southern suburbs of Chicago. Century 21 had contracted with the multiple listing

[that] began deteriorating because they had no experience in keeping a place up." BERRY, supra note 1, at 356 (quoting CHI. SUN TIMES, July 9, 1971).

364. South-Suburban Hous. Ctr., 935 F.2d at 873.
365. Id. South-Suburban Housing Center conducts fair housing activities throughout the southern suburbs of Chicago. These activities include affirmative action efforts, as well as enforcement of the Act's antidiscrimination provisions through the use of testers. The center filed forty lawsuits or administrative charges alleging housing discrimination from 1975 to 1988. See Housing Ruling, supra note 312, at 2.
366. South-Suburban Hous. Ctr., 935 F.2d at 873.
367. Id.
368. Id. at 873. The plan also required the realtor to take no action that limited the housing choice of any client on the basis of race. Id.
369. Id. The special outreach efforts did not require the multiple listing service, or its other member brokers, to engage in special outreach activities. There was no reference in the multiple listing publication to affirmative marketing or special outreach. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1077 (N.D. Ill. 1988), aff'd in part and rev'd in part, 935 F.2d 868, cert. denied, 112 S. Ct. 971 (1992). However, if a multiple listing service participant showed the Apache Street properties to a customer, he was to provide the Century 21 agent with customer information, including race. Id.
370. South-Suburban Hous. Ctr., 935 F.2d at 873-74. The Board of Realtors also asserted that the plan violated the Realtor Code of Ethics and the voluntary affirmative marketing agreement with HUD. A complaint was also filed against the agent with the realtor's equal opportunity commission, but was later withdrawn. Id.
services to submit all of its listings to the service. In return, Century 21 received access to the listings provided by all other members of the service. Century 21 could then show these additional listings to its home seeking prospects. If the client bought a house listed by a member broker, Century 21 would then share in the commission. The Board of Realtors later allowed the Housing Center access on the condition that it indemnify the Board from any liability arising from the plan.

The Housing Center sued for relief under the Fair Housing Act, alleging that the Board's denial of access to the multiple listing service had the effect of making the Apache Street properties otherwise unavailable to whites in violation of section 3604(a), (2) violated section 3606 by discriminating against whites in the provision of brokerage services on account of race, and (3) interfered with the Housing Center on account of its encouraging whites in the exercise of their housing rights, and thus violated section 3617.

The Board of Realtors counterclaimed for declaratory and injunctive relief under the Act, asserting that the Housing Center's affirmative marketing plan constituted steering of individuals on the basis of race and thus made housing "otherwise unavailable" in violation of section 3604(a). The Village of Park Forest was also joined as a defendant, on the basis that it was also involved with the efforts to affirmatively market the Apache Street properties.

B. The District Court Decision

The United States District Court for the Northern District of Illinois ruled that the Housing Center's affirmative marketing plan was per se legal, holding that it did not contemplate the lessening of

372. Id. at 1077.
373. Id.
374. Id.
375. Id.; see supra note 45 (discussing the advantages of using a multiple listing service to market property).
377. South-Suburban Hous. Ctr., 713 F. Supp. at 1079-80. The Housing Center also filed claims against the Board alleging breach of contract and tortious interference with a contract. Id. at 1080-81.
378. Id. at 1083. The Board also claimed that the affirmative marketing plan violated §§ 1982-1983 of the Civil Rights Act of 1866, as well as the Equal Protection Clause of the Fourteenth Amendment. Id. The district court denied each of the civil rights claims, and ruled that the realtors did not have standing to assert an equal protection violation. Id. at 1084-86.
379. South-Suburban Hous. Ctr., 935 F.2d at 872.
normal marketing activities, and thus did not "affect detrimentally the availability of housing" to any person on account of race.\textsuperscript{380} The district court utilized the \textit{Arlington Heights} multifactor test\textsuperscript{381} to analyze whether the special outreach efforts to whites denied or made unavailable housing to minorities in violation of section 3604(a) of the Act.\textsuperscript{382} The district court held: (1) The program did not have a disparate impact on the availability of housing to minorities, as it served to increase, not decrease, the existing supply of housing information; (2) there was no discriminatory intent, as no evidence indicated the Housing Center intended to control the movement and distribution of minorities; (3) the Housing Center activities were infused with a strong public interest, as their purpose was to promote the national goal of stable, integrated housing; and (4) the relief sought by the Board of Realtors would permanently enjoin the Housing Center from using this program, which would require an unacceptable level of judicial intrusion on the Housing Center's autonomy.\textsuperscript{383} The district court concluded that all four \textit{Arlington Heights} factors weighed in favor of the Housing Center.\textsuperscript{384}

The district court also ruled that the restrictions imposed by the Board of Realtors on access to the multiple listing service did not violate any provision of the Fair Housing Act.\textsuperscript{385} The district court reasoned that the decision by the Board to initially deny and later condition access of the Apache Street properties to its multiple listing service was not a pretext to discrimination, but was motivated by legitimate fears of liability and philosophical disagreement with

\textsuperscript{380} \textit{South-Suburban Hous. Ctr.}, 713 F. Supp. at 1086. \textit{South-Suburban Housing Center} was consolidated with several other cases dealing with various real estate practices in the south suburban area of Chicago: Greater South Suburban Board of Realtors v. City of Blue Island, City of Country Club Hills, Village of Glenwood, Village of Hazel Crest, Village of Matteson, Village of Park Forest, Village of Richton Park, Village of University Park. \textit{Id.} at 1090-103. The primary issues in these cases involved the legality of certain "anti-blockbusting" ordinances limiting the ability of realtors to solicit business in the community, and ordinances limiting the size and placement of for-sale signs on property. \textit{Id.} at 1090. The district court approved various municipal ordinances limiting the size and placement of for-sale signs, the ordinance's purpose being to minimize white panic and flight in the face of changing racial demographics in the area. \textit{Id.} at 1091. The court struck down one ordinance that banned all for-sale signs. \textit{Id.} It also struck down as unconstitutionally vague antisolcitation ordinances that prohibited realtors from soliciting or contacting any resident regarding real estate if that resident did not want to be contacted, ruling that they violated the First Amendment. \textit{Id.} at 1096.

\textsuperscript{381} See supra text accompanying notes 200-06 (outlining parameters of test in detail).

\textsuperscript{382} \textit{South-Suburban Hous. Ctr.}, 713 F. Supp. at 1087.

\textsuperscript{383} \textit{Id.} at 1087-88.

\textsuperscript{384} \textit{Id.} at 1088.

\textsuperscript{385} \textit{Id.} at 1080.
the special outreach efforts. Applying the *Arlington Heights* test, the district court also held that the restrictions did not have a discriminatory effect on white home buyers. The Board of Realtors appealed the district court's ruling that the Housing Center's affirmative marketing plan was legal. The appeal by both parties to the Seventh Circuit Court of Appeals followed.

C. The Seventh Circuit's Decision

The Seventh Circuit upheld the district court ruling on all counts. It held that the affirmative marketing plan did not discriminate against minorities in violation of the Fair Housing Act. It also held that the multiple listing service restrictions imposed by the Board of Realtors did not discriminate against white home

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386. *Id.* at 1079 (noting that affirmative marketing was uncertain legal terrain at the time and, observing that although the plan was legal, "there was substantial room for disagreement, on both the legal and philosophical front").

387. *Id.* at 1079-80. The Housing Center elected not to appeal the district court's ruling that restricting or conditioning access to the multiple listing service by the Board did not have a discriminatory effect on whites. As to the degree of discriminatory effect of the multiple listing service restrictions, the district court first held that since the purpose of the special outreach program was to attract whites to the properties in numbers beyond what would normally be expected with typical marketing programs, the affirmative marketing itself had a disparate impact, and "[t]o the extent that defendants' activities may decrease[,] the impact of affirmative marketing would not itself equal disparate impact." *Id.* It also held that the denial of listing service access did not perpetuate segregation and that "[t]he actions of defendants in denying use its [multiple listing service], if anything, would make it more difficult to sell the homes to blacks." *Id.* at 1080.

As to the Board's motivation for denying listing service access, the court ruled that the Board's fear of liability exposure for illegal steering if it cooperated was legitimate. *Id.* In analyzing the character of relief sought by the Housing Center, the district court noted that the Housing Center sought to "compel defendants to assist in its affirmative marketing activities," although it noted the intrusion was not severe. *Id.* Weighing the *Arlington Heights* factors, the district court ruled that the conditioning of access to the multiple listing service did not have a discriminatory effect against white home buyers. *Id.*


389. *Id.* at 871. In a lengthy analysis, the Seventh Circuit also upheld the district court ruling that the realtors lacked standing to assert the equal protection claims of black home buyers. Stating that third-party standing is discouraged under the Constitution, the court reasoned that it was unclear whether the interests of the realtors and black home buyers were coterminous. *Id.* at 880.

With respect to the consolidated cases, the Seventh Circuit upheld all but one of the ordinances limiting the use of for-sale signs. *Id.* at 887-97. The Seventh Circuit reversed the district court regarding the legality of a for-sale sign ordinance in Country Club Hills. It held that the $50 licensing fee imposed by the village was not related to a legitimate government purpose, and therefore violated the First Amendment. *Id.* at 898. The Seventh Circuit also reversed the district court's ruling on the antisolicitation ordinances, and held that the ordinances constituted valid time, place, and manner restrictions on the realtors' limited commercial speech rights. *Id.* at 894.

390. *Id.* at 884-85.
buyers.\textsuperscript{391}

1. Affirmative Marketing Ruling

The court first ruled that the affirmative marketing plan did not "make unavailable or deny" housing to minorities in violation of section 3604(a) of the Act.\textsuperscript{392} The court noted that section 3604(a) prohibits discriminatory actions, or certain actions with significant discriminatory effects, that affect the availability of housing.\textsuperscript{393} It then rejected the Board of Realtors' claim that the plan directed information about housing away from blacks and towards whites and thus limited the availability of housing for black home buyers.\textsuperscript{394} The Board had argued that the affirmative marketing efforts illegally subordinated equal housing opportunity to the goal of integration.\textsuperscript{395} The Seventh Circuit cited United States v. Starrett City Associates\textsuperscript{396} and United States v. Charlottesville Redevelopment and Housing Authority\textsuperscript{397} as mandating the conclusion that an interest in racial integration alone is insufficient to justify a racial system that favors whites and thereby lessens housing opportunities for minorities.\textsuperscript{398} The court then distinguished the Park Forest affirmative marketing plan from the racial quotas invalidated in Starrett City and Charlottesville.\textsuperscript{399} It reasoned that, unlike racial quotas, the affirmative marketing efforts did not exclude minorities from housing opportunities.\textsuperscript{400} Therefore, there were no conflicting goals, since the plan did not promote integration at the expense of equal housing opportunity.\textsuperscript{401}

The Seventh Circuit then used the racial steering standard of review to analyze the Board of Realtors' claim that the plan deterred blacks from buying in Park Forest by directing essential information

\begin{itemize}
\item \textsuperscript{391} Id. at 886-87.
\item \textsuperscript{392} Id. at 882.
\item \textsuperscript{393} Id. (citing Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984)).
\item \textsuperscript{394} Id. at 884.
\item \textsuperscript{395} Id. at 882.
\item \textsuperscript{396} 840 F.2d 1096 (2d Cir.), cert. denied, 488 U.S. 946 (1988).
\item \textsuperscript{397} 718 F. Supp. 461 (W.D. Va. 1989).
\item \textsuperscript{398} South-Suburban Hous. Ctr., 935 F.2d at 883; see supra notes 250-62, 272-76 and accompanying text (discussing the reasoning of Starrett City and Charlottesville).
\item \textsuperscript{399} South-Suburban Hous. Ctr., 935 F.2d at 883.
\item \textsuperscript{400} Id.
\item \textsuperscript{401} Id.; see also supra notes 123-30 (discussing the fact that race-conscious integration efforts also create social and political tensions, in addition to legal tension).
\end{itemize}
about the properties away from blacks, and by stigmatizing black residents and home seekers.\textsuperscript{402} The court, citing \textit{Village of Bellwood v. Dwivedi},\textsuperscript{403} stated that the element of intent required in a steering case was the same as required for Title VIII cases brought on a disparate treatment theory.\textsuperscript{404} \textit{Village of Bellwood} held that disparate treatment means treating persons differently because of their race, and implies a purpose to use race as a decision-making tool.\textsuperscript{405} The \textit{South-Suburban Housing Center} court stated that "'[p]roof of a discriminatory motive is critical' in a Title VII disparate treatment case, 'although it can in some cases be inferred from the mere fact of differences in treatment.'"\textsuperscript{406}

Applying the standard of review to the facts, the Seventh Circuit reasoned that the affirmative marketing plan merely created additional traffic to the properties, since they were primarily of interest to blacks.\textsuperscript{407} The affirmative marketing plan would constitute illegal steering only if individual customers were denied housing or misled as to its availability on the basis of race.\textsuperscript{408} The court found that the Housing Center did not intend to decrease or restrict black traffic through its plan.\textsuperscript{409} In contrast, the Housing Center attempted to direct information about additional housing opportunities to white home buyers that they "might not ordinarily know about and thus choose to pursue."\textsuperscript{410} Therefore, the Seventh Circuit concluded, since the special outreach efforts merely created additional white traffic to the properties, and did not involve lessening of efforts to attract black home buyers, the Housing Center's affirmative marketing plan did not constitute intentional discrimination.\textsuperscript{411} The Seventh Circuit also rejected the Board of Realtors' argument that the increased competition among black and white home buyers was discriminatory, stating that "this is precisely the type of robust multi-

\textsuperscript{402} \textit{South-Suburban Hous. Ctr.}, 935 F.2d at 883-84.
\textsuperscript{403} 895 F.2d 1521 (7th Cir. 1990).
\textsuperscript{404} \textit{South-Suburban Hous. Ctr.}, 935 F.2d at 883 (citing \textit{Village of Bellwood}, 895 F.2d at 1529-30).
\textsuperscript{405} 895 F.2d at 1529-30.
\textsuperscript{406} \textit{South-Suburban Hous. Ctr.}, 935 F.2d at 883 (citing \textit{Village of Bellwood}, 895 F.2d 1521, 1529-30 (7th Cir.) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))).
\textsuperscript{407} \textit{Id.} at 883-84.
\textsuperscript{408} \textit{Id.} at 884 (citing \textit{Village of Bellwood v. Dwivedi}, 895 F.2d 1521, 1530 (7th Cir. 1990)).
\textsuperscript{409} \textit{Id.}
\textsuperscript{410} \textit{Id.}
\textsuperscript{411} \textit{Id.} The court further stated that the affirmative marketing plan, in addition to promoting integration, also served the Act's purpose of making housing equally available to all. \textit{Id.}
racial market activity which the Fair Housing Act intends to stimulate."\(^{412}\)

The court also rejected the Board of Realtors' claim that the special outreach advertising indicated a preference based on race in violation of section 3604(c), which prohibits discriminatory advertisements.\(^{413}\) It noted that the affirmative marketing merely provided additional color-blind promotion and advertising towards a racial group underrepresented in the community.\(^{414}\) The plan contained no quota or other provisions purporting to make race a factor in determining who could purchase the homes.\(^{415}\) Thus, The Seventh Circuit concluded that the efforts were not an improper statement of racial preference.\(^{416}\)

2. The Multiple Listing Service Ruling

The Seventh Circuit also ruled that the Board of Realtors did not violate the Fair Housing Act by denying or conditioning access of the Apache Street properties to its multiple listing service.\(^{417}\) Noting that this was an issue of first impression, the court first found that the Board did not violate section 3606 of the Act by intentionally discriminating against white home buyers in the provision of brokerage services.\(^{418}\) It held that although the Fair Housing Act permits affirmative marketing, it does not require it, nor does it require one party to cooperate with the affirmative marketing efforts of another.\(^{419}\) Addressing the issue of whether the Board's philosophical disagreement with affirmative marketing would justify restrictions on access to its multiple listing service, the Seventh Circuit relied on Village of Bellwood\(^ {420}\) for the proposition that the Fair Housing Act "does not impose liability for failing to promote integration . . .

\(^{412}\) Id. The court stated that affirmative marketing "may simply be a wise business move" in that it stimulates increased competition in the marketplace. Id.

\(^{413}\) Id. at 884-85; see supra note 39 (discussing parameters of §3604(c)).

\(^{414}\) South-Suburban Hous. Ctr., 935 F.2d at 884.

\(^{415}\) Id. at 884-85.

\(^{416}\) Id.

\(^{417}\) Id. at 886.

\(^{418}\) Id.; see 42 U.S.C. § 3606 (1988) (making it "unlawful to deny any person access to or membership or participation in any multiple listing service . . . or to discriminate against him in the terms or conditions of such access, membership or participation, on account of race"). The Housing Center elected not to appeal the district court ruling that the board's action did not have a discriminatory effect against white home buyers in violation of § 3604(a) of the Act. South-Suburban Hous. Ctr., 935 F.2d at 885 n.14.

\(^{419}\) South-Suburban Hous. Ctr., 935 F.2d at 885-86.

\(^{420}\) 895 F.2d 1521 (7th Cir. 1990).
[and] [i]f the broker treats all his customers the same, regardless of race, he is not liable.”

Reasoning from this proposition, the Seventh Circuit concluded that a realtor’s decision to adopt a color-blind marketing policy could never constitute discrimination on the basis of race. Therefore, since the multiple listing service restrictions were adopted to further this color-blind policy, they did not constitute discrimination in the provision of brokerage services.

The court also ruled that the multiple listing service limitations did not violate section 3617 of the Fair Housing Act by interfering with the Housing Center on account of its efforts to inform white persons of housing opportunities. The court held that under the factual circumstances of this case, the section 3617 prohibition against interfering with the exercise or enjoyment of housing rights did not provide an independent source of liability. The Seventh Circuit’s reasoning relied on a footnote in Metropolitan Housing Development Corp. v. Village of Arlington Heights, which stated that where conduct alleged to have violated section 3617 is the same conduct that allegedly violated another section of the Act (i.e., otherwise making housing unavailable), the validity of the interference claim depends on whether the conduct also violates the other section. Here, the Board of Realtors’ restriction on multiple listing service access was alleged to have violated both the prohibition against discrimination in brokerage services and the prohibition against interfering with the exercise of housing rights. Since there was no discrimination in brokerage services, the Seventh Circuit reasoned that there was also no illegal interference with the exercise

421. South-Suburban Hous. Ctr., 935 F.2d at 886 (quoting Village of Bellwood, 895 F.2d at 1531).
422. Id. But cf. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (holding that facially neutral public policies that have the effect of perpetuating segregation may illegally discriminate on the basis of race), cert. denied, 434 U.S. 1025 (1978).
423. South-Suburban Hous. Ctr., 935 F.2d at 885-86.
424. Id.; see supra notes 46-53 and accompanying text (discussing the three separate ways a § 3617 interference violation can be established).
426. 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).
427. South-Suburban Hous. Ctr., 935 F.2d at 886 (quoting Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977)). In Arlington Heights, the Seventh Circuit held that under the facts of the case, the validity of the § 3617 claim depended upon whether the village’s failure to rezone for low-income housing also made housing “otherwise unavailable” for minorities in violation of § 3604(a). Arlington Heights, 558 F.2d at 1288. The Arlington Heights court left open the question of whether § 3617 can ever be violated in the absence of other Title VIII violations. Id.
428. South-Suburban Hous. Ctr., 935 F.2d at 886.
of housing rights.\textsuperscript{429} It stated that the realtors did not oppose whites learning about the properties. The realtors merely disagreed with the special outreach efforts to them.\textsuperscript{430} The Seventh Circuit thus concluded that the Housing Center "failed to demonstrate interference with the aiding or encouraging of other persons in the exercise of rights under the Fair Housing Act."\textsuperscript{431}

III. ANALYSIS

The Seventh Circuit, as a result of its decision in \textit{South-Suburban Housing Center}, became the first federal appellate court to uphold the use of private affirmative marketing efforts. In particular, the court's decision sanctions the use of affirmative marketing techniques by private, for-profit realtors,\textsuperscript{432} who are among the most influential institutions in the housing industry.\textsuperscript{433} Although the holding was correct, the Seventh Circuit conducted an incomplete legal analysis of the affirmative marketing plan. The Park Forest affirmative marketing plan did not present a traditional steering issue for analysis, as the reasoning of the Seventh Circuit implies. Instead, the affirmative marketing efforts at issue focused on potential, unidentified customers, and whether these efforts reduced the availability of housing information to minorities. Prior case precedent under Title VIII shows that, under section 3604(a), determining if affirmative marketing affected the availability of housing requires analyzing the plan under a discriminatory effect standard as well.\textsuperscript{434} In particular, affirmative marketing may be noble in its purpose, but its implementation may unintentionally reduce the volume of housing information available to minorities. This Note offers a test for

\begin{thebibliography}{99}
\bibitem{429} Id.
\bibitem{430} Id. at 886-87. The Seventh Circuit stated that the Fair Housing Act guarantees equal treatment, not preferential treatment. Id. at 886.
\bibitem{431} Id. The court further noted that limiting access to the multiple listing service did not limit the ability of the South Suburban Housing Center to aid or encourage white persons "in their right to enjoy equal treatment in the housing market." Id. at 887 (emphasis added).
\bibitem{432} Id.
\bibitem{433} See supra note 18 (discussing ability of real estate brokers to change quickly the racial composition of neighborhoods through blockbusting tactics).
\bibitem{434} See Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1319 n.7 (N.D. Ill. 1987) (holding that § 3604(a) does not only prohibit steering, but all practices that have "the effect of making housing unavailable to minorities"); see also Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984) (noting that § 3604(a) is concerned with both discriminatory actions and neutral actions with discriminatory effects).
\end{thebibliography}
determining whether minority access to housing information has been reduced by a particular affirmative marketing plan, and if so, whether the reduction violates the Fair Housing Act by otherwise making unavailable or denying housing on account of race.

The court's decision in *South-Suburban Housing Center* gave a ringing endorsement to the use of affirmative marketing plans by private entities. However, the Seventh Circuit simultaneously removed the teeth from its endorsement by holding that realtors do not have to cooperate with other realtors' affirmative marketing activities. Specifically, it held that realtors can withhold services from other realtors engaging in special outreach efforts. In urban areas, where cooperation between realtors is an important component of real estate sales, the effect of *South-Suburban Housing Center* is to make affirmative marketing techniques "otherwise unavailable" for many realtors. Far from allowing realtors to withhold cooperation from affirmative marketing efforts, *South-Suburban Housing Center* actually sanctions the right of realtors to interfere with private affirmative marketing efforts. This directly contravenes the express prohibitions of section 3617 of the Act.

This section of the Note critically examines the Seventh Circuit's decision regarding restricting access to the multiple listing service. It posits that (1) requiring the Board of Realtors to unconditionally list the Apache Street properties in its multiple listing service would not force the Board to cooperate with the Housing Center's special outreach efforts, and (2) the access restriction established an interference violation under section 3617 of the Act, independent of the extent the restrictions discriminated in the provision of brokerage services.

**A. Legality of the Affirmative Marketing Plan**

*South-Suburban Housing Center* represents the first federal appellate court decision to explicitly hold that private race-conscious programs to maintain integration in housing are legal under the Fair Housing Act. This subsection analyzes the *South-Suburban*
Housing Center decision regarding the legality of affirmative marketing in light of prior Title VIII case precedent involving benign race-conscious plans; as well as analyzing how faithful the Seventh Circuit was to the current analogy between the Title VII and Title VIII standards of review.

1. Applying the Steptoe Doctrine

The decision in South-Suburban Housing Center represents an important extension of doctrine established in Steptoe v. Beverly Area Planning Association, which upheld the legality of private housing information programs that assisted only those willing to make integrative moves. The Steptoe court reasoned that the program did not illegally steer customers or negatively affect the availability of housing information, because normal real estate channels were still available and the housing center did not participate or influence any real estate transactions.

South-Suburban Housing Center extended this doctrine to parties with a direct stake in real estate transactions. Unlike the center in Steptoe, South-Suburban Housing Center and Century 21 sought to directly influence housing transactions through affirmative marketing activities. The Seventh Circuit held that this direct influence did not illegally steer persons to different properties based on their race. According to the court, the Housing Center's affirmative marketing program did not seek to steer individual customers by directing home buyers interested in equivalent properties to different areas according to their race. Like the situation in Steptoe, the normal real estate marketing channels were available and unaltered. Instead, the Housing Center sought to stimulate interest in the Apache Street properties by steering additional information about them to white home buyers, who were underrepresented in the

\[\text{center}]\); Alschuler v. HUD, 515 F. Supp. 1212, 1234 (N.D. Ill. 1981) (affirmative marketing of public housing project), aff'd, 686 F.2d 472 (7th Cir. 1982).

439. Id. at 1315.
440. Id. at 1319.
442. Id. at 883 (discussing the plan's purpose of stimulating white traffic to an area with little present white interest).
443. Id. at 883-84.
444. Id.
445. Id.
community. There was no lessening of efforts to attract black home buyers. The Seventh Circuit held that stimulating competition by directing additional information to a certain racial group did not deny housing to minorities in violation of section 3604(a). The Seventh Circuit essentially sailed into uncharted waters with this reasoning, broadening the scope of permissible affirmative marketing programs beyond what even HUD had intimated was appropriate.

South-Suburban Housing Center endorses the use of affirmative marketing by for-profit real estate professionals. HUD has given approval to affirmative marketing by private nonprofit fair housing agencies, but its regulations are silent in regards to its use by realtors, whose influence in the marketplace could easily tip affirmative marketing into racial steering. South-Suburban Housing Center is best interpreted as allowing cooperative special outreach ventures between fair housing agencies and private realtors. It should not stand for the premise that private realtors or realty groups may unilaterally undertake affirmative marketing ventures.

2. Adherence to the Title VII/Title VIII Analogy

South-Suburban Housing Center also widened the separation between Title VII and Title VIII doctrine. In the Title VII employment context, voluntary efforts by private employers to maintain an
integrated workforce are impermissible. But South-Suburban Housing Center held that private efforts to maintain integration in housing under Title VIII are permissible. This supports the proposition that under Title VIII, efforts to maintain integration should be analyzed the same way as efforts to achieve integration.

South-Suburban Housing Center also distanced itself from Title VII precedent that holds that affirmative action employment programs are legal only if they are implemented in response to prior racial discrimination or imbalance in the workplace. The Second Circuit in United States v. Starrett City Associates relied on this Title VII framework, and held that an apartment complex occupancy quota was illegal in part because there was no evidence showing the existence of prior racial discrimination or discriminatory imbalances adversely affecting whites within the apartment complex. Like the apartment complex in Starrett City, there was no history of racial discrimination in Park Forest prior to the time affirmative marketing was instituted. Park Forest had been conceptualized as an "open" community, and various government organizations had worked towards maintaining stable integration within Park Forest since it was incorporated in 1947. But unlike the court in Starrett City, the Seventh Circuit implied that the Act's goal of promoting integration is so strong that nondiscriminatory race-conscious efforts may be instituted even where no housing discrimination previously existed.


455. The Second Circuit reached an opposite conclusion in United States v. Starrett City Associates, 840 F.2d 1096, 1103, cert. denied, 488 U.S. 946 (1988), at least with respect to quotas, reasoning that efforts to maintain integration, as opposed to temporary efforts to achieve integration, have a more burdensome impact on minorities. Id.


458. United States v. Starrett City Assocs., 840 F.2d 1096, 1102 (2d Cir.), cert. denied, 488 U.S. 946 (1988). The court noted that Starrett City was initiated as an integrated community, and that the race-conscious tenancing practices were in place expressly to maintain that initial integration. Id.

459. See Berry, supra note 1, at 351-74 (describing Park Forest experience with integration); see also supra notes 246-49 and accompanying text (discussing history of racial integration efforts in Park Forest).

460. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 884 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992) (reasoning that stimulating increased competition between black and white home buyers fits in perfectly with the integration goal of the Fair
Finally, in *South-Suburban Housing Center* the Seventh Circuit also distanced itself from Title VII precedent that allows voluntary affirmative action only if it is temporary in nature. The Second Circuit relied on this Title VII affirmative action precedent in *United States v. Starrett City Associates*, invalidating a housing occupancy quota partially on the grounds that it was permanent, not temporary in nature. It reasoned that since the goal of integration maintenance is continually threatened by the potential for white flight, there was no definite, perceivable termination date for the quotas. In contrast, in *South-Suburban Housing Center* the Seventh Circuit impliedly held that race-conscious housing programs that were permanent in nature (implemented to combat tipping and help maintain integration) did not violate Title VIII, at least in the context of affirmative marketing.

This move away from a rigid adherence to Title VII doctrine will enable courts to ensure that the dual purposes of the Fair Housing Act are both served. Unlike Title VIII, the purpose of Title VII was only to end discrimination in the workplace, not also to maintain integration in the workplace. Thus, Title VII precedent may not contain all the mechanisms needed to promote the integration goal mandated by the Fair Housing Act.

3. **Categorizing the Affirmative Marketing Plan for Analysis**

*South-Suburban Housing Center* involved efforts to maintain integration by controlling the flow of information about specific
properties. Benign race-conscious efforts to manipulate the flow of information about certain properties generally fall into two categories. The first method involves controlling which specific customers receive information about the properties. The second method involves controlling which potential customer pool receives information about specific properties. The special outreach efforts utilized by the Housing Center and Century 21 fall into the second category.

The two information control mechanisms present distinctly different legal implications. Efforts to control which specific customers receive information about certain properties can be broken down further into two subcategories: (1) efforts by groups that control property or are directly involved in the transaction process, and (2) efforts by groups that merely supplement normal real estate channels. Efforts by the former group channel customers to properties on the basis of race, and thus constitute "reverse steering" in violation the Fair Housing Act. The court in Steptoe v. Beverly Area Planning Association sanctioned efforts by the latter group, reasoning that the fair housing organization in question only supplemented normal marketing channels. Thus, although the fair housing organization withheld information about certain properties

468. Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313 (N.D. Ill. 1987). The fair housing organization ("BAPA") in Steptoe counseled individual customers about housing choices. It only gave information on pro-integrative moves. BAPA would not give information on traditional housing choices. Thus, if the customer were white, BAPA would not channel any information about property in white neighborhoods to the customer. BAPA would instead direct the customer to normal marketing channels to receive that information. Id. at 1315.

469. See infra notes 476-77 and accompanying text (discussing elements of this type of information manipulation).


471. Research has revealed no litigation involving affirmative marketing programs presenting this type of factual scenario.

472. See supra note 345-48 (discussing parameters of the Steptoe technique).

473. See supra note 38 and accompanying text (defining traditional steering). The essential elements of a steering violation are a limitation on housing choice, and if techniques are choice-limiting they violate Title VIII regardless of their purpose. Fair Housing Hearings, supra note 15, at 179 (statement of Alexander Polikoff). Polikoff asserts that the National Association of REALTORS encourages broker statements designed to encourage specific customers to make integrative moves. These statements are different in effect than realtor conduct of not giving information about specific properties to certain racially identifiable customers. Id. at 23; cf. Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (stating that the purpose of steering is to maintain segregation).

depending on the customer's race, normal marketing channels were unaffected, and the normal range of housing choices was not reduced.478

Efforts to manipulate the potential customer pool for a specific property do not affect identifiable customers, and thus present different legal implications under the Fair Housing Act. These efforts also fall into two separate subcategories. The first method involves controlling where information is directed in order to attract customers of a particular racial group or groups.478 The second method involves manipulating the content of the information in order to attract a certain racial mix, or customers of a particular racial group.477

South-Suburban Housing Center involved private efforts to manipulate the direction of information on specific properties.478 The effort was race conscious in that the Housing Center and Century 21 intentionally directed additional information to certain locations on the basis that they were predominantly white, and intentionally

475. Id.
477. Ragin v. New York Times Co., 923 F.2d 995 (2d Cir.) (ruling that advertisements indicating preference for white customers by repetitive advertising depicting white models as consumers and black models as service employees violates § 3604(c) of the Act), cert. denied, 112 S. Ct. 81 (1991). HUD regulations state that selective use of human models may have a discriminatory impact. 24 C.F.R. § 109.25 (1991). An example of such selective use is "an advertising campaign using human models primarily in media that cater to one racial . . . segment of the population without a complementary advertising campaign that is directed at other groups." Id. § 109.25(c). HUD further cautions that models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, and should portray them on an equal social footing. Id. § 109.30(b).

HUD states that these regulations should not be construed to restrict advertising efforts to attract persons to dwellings who would not otherwise be expected to apply, when conducted pursuant to an affirmative marketing program. Id. § 109.16(b). Previous statements of the HUD general counsel also take this view. Letter from John J. Knapp, HUD general counsel, to William D. North, at 3 (Aug. 6, 1985), reprinted in Fair Housing Hearings, supra note 15, at 24. Knapp states that William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division of the United States Department of Justice, supports the use of minority models when advertising in white areas, observing that this "conveys a message of inclusiveness, rather than exclusiveness, given the current community profile." Id. The Second Circuit does not appear to adopt this exception. Ragin, 923 F.2d at 1000 (stating that the statute prohibits all ads that indicate a racial preference to an ordinary reader, whatever the advertisers' intent). Additionally, the example cited by Assistant Attorney General Reynolds differs from use of white models to advertise housing in racially mixed areas. This may convey the message of exclusiveness, that blacks are not preferred.

advertised in selected media because it had a predominantly white audience. The Seventh Circuit upheld this type of information manipulation, but with an important qualification. It implied that to comport with Title VIII, race-conscious manipulation of where housing information is directed must be additional to, and not substituted for, normal marketing activities. Although the Seventh Circuit indicated that Century 21 had not altered or reduced normal marketing activities with respect to the Apache Street properties, it left unanswered the question of how to determine, absent evidence of a purpose to lessen normal marketing, if a realtor has decreased normal marketing activities to accommodate special outreach efforts. It also did not address when, if ever, such a decrease would violate the Fair Housing Act by making housing otherwise unavailable to a particular racial group by denying them access to information about specific properties.

4. Intent vs. Effect Analysis

In reasoning that the Housing Center's affirmative marketing plan did not violate the Fair Housing Act, the Seventh Circuit analyzed the controversy as involving a claim of "reverse" steering. Relying on the precedent of Village of Bellwood v. Dwivedi, the court focused solely on the fact that the Housing Center did not

479. The reasoning of the court in South-Suburban Housing Center adopted HUD's position on selective geographic advertisement. See 24 C.F.R. § 109.25, 109.25(a) (stating generally that brochure advertisements distributed within a limited geographic area, advertising in particular geographic coverage sections of major metropolitan newspapers, or advertising in limited circulation newspapers reaching one segment of the community are marketing techniques that may have a discriminatory impact). However, HUD also states that these regulations should not be construed to limit advertising pursuant to an affirmative marketing program. 24 C.F.R. § 109.16. South-Suburban Housing Center adopts this exception by holding that additional special advertising in limited circulation newspapers and brochure advertisements distributed within narrow geographical boundaries did not violate the Fair Housing Act. South-Suburban Hous. Ctr., 935 F.2d at 883-84.

480. South-Suburban Hous. Ctr., 935 F.2d at 883-84 The court concluded that the affirmative marketing plan was legal because it "merely creates additional information to white homebuyers," and it rejected the board's claim that the plan directed "essential information about housing availability away from blacks and towards whites." Id.

481. See Shnay & Campbell, supra note 313, at 8 (quoting Laurene Janik, NAR general counsel, stating that "[y]ou can't make a special effort to reach one group without taking time from talking to other groups").

482. South-Suburban Hous. Ctr., 935 F.2d at 883 (observing that the Board contended that the plan deterred blacks from buying on Apache Street by directing essential information about housing availability away from blacks and towards whites).

483. 895 F.2d 1521 (7th Cir. 1990).
intentionally discriminate against minorities through its plan. The Seventh Circuit reasoned that proof of reverse steering requires a showing that the defendant treated persons differently because of race, and that "proof of a discriminatory motive is critical." According to the court in South-Suburban Housing Center, a steering violation can only occur when individual customers are channeled towards particular properties because of race. Thus, the court implied that the Fair Housing Act does not apply to steering of potential customers, or race conscious influence of the marketplace. Since there was no evidence that the Housing Center implemented the affirmative marketing program with the purpose of restricting black traffic, there could be no Fair Housing Act violation.

The court in South-Suburban Housing Center did not address whether the Housing Center's affirmative marketing plan had a discriminatory effect on potential minority homebuyers. The Seventh Circuit only analyzed the Board of Realtor's claim as involving allegations of discriminatory intent. Thus, the Seventh Circuit held that the Housing Center's affirmative marketing plan had the legally permissible intent of attracting additional white traffic to the properties. In this regard, the Seventh Circuit correctly recognized that racial prejudice affects demand for housing when it ruled that the Apache Street neighborhood appealed primarily to black

484. South-Suburban Hous. Cir., 935 F.2d at 883 (citing Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-30 (7th Cir. 1990), for the proposition that the mental element required in a steering case is one of disparate treatment or discriminatory motive).

485. Id. at 883. But see Heights Community Cong. v. Hilltop Realty, 774 F.2d 135,143-49 (6th Cir. 1985) (holding that unsolicited statement by a realtor that a neighborhood had a heavy black population violated the Act even if the statement was intended to be merely informational and not intended to steer), cert. denied, 475 U.S. 109 (1985).

486. South-Suburban Hous. Cir., 935 F.2d at 883-84 (emphasis added). The Seventh Circuit relied in part on a passage in Village of Bellwood stating that steering involves "refusing to show properties because of the race of the customer, or misleading the customer about the availability of properties because of his race, or cajoling or coercing the customer because of his race to buy this property or that or look in this community rather than that"). Id. at 884 (quoting Village of Bellwood, 895 F.2d at 1530). The clear implication of the statement in Village of Bellwood is that an essential element of steering is the existence of bilateral communication between the realtor and an identifiable customer.

487. Id. at 884 ("[W]e see nothing wrong with SSHC [the Housing Center] attempting to attract white persons to housing opportunities they might not ordinarily know about and thus choose not to pursue.") (emphasis added).

488. Id.

489. See supra notes 402-12 and accompanying text (discussing the Seventh Circuit's intentional discrimination analysis).

490. South-Suburban Hous. Cir., 935 F.2d at 884.
homebuyers, and therefore, the special outreach efforts to whites did not automatically direct housing information away from blacks. It is well settled, however, that benign motivations can still violate the Fair Housing Act if they "deny" or make "otherwise unavailable" housing to persons or groups on the basis of race. Section 3604(a) does not prohibit intentional steering only; it also prohibits all practices having the effect of making housing unavailable to minorities. Prior courts examining the issue of whether race-conscious housing practices make housing unavailable to minorities have applied a discriminatory effects standard of review also. Even the district court in South-Suburban Housing Center analyzed whether the Housing Center plan had a discriminatory effect on minorities.

The Seventh Circuit should also have focused on whether the mechanics of the plan had the effect of limiting the flow of information about the Apache Street properties to potential black home seekers. Unlike the counseling center in Steptoe v. Beverly Area Planning Association, Century 21 was engaged in the provision of housing. It controlled the marketing mechanism for properties, and thus had the capability of making housing unavailable. Of

491. See Otero v. New York Hous. Auth., 484 F.2d 1122, 1129 (2d Cir. 1973) (asserting that concentration of minorities in one neighborhood will decrease white demand for housing in adjacent areas).
492. Cf. Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979) (stating that racial attitudes must be taken into account when formulating specific strategies to implement civil rights goals).
494. Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1319 n.7 (N.D. Ill. 1987). The Seventh Circuit also ignored the rationale of a case they cited to, and quoted from, in their opinion, Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984) (holding that § 3604(a) prohibits both "direct discrimination and practices with significant discriminatory effects").
495. United States v. Starrett City Assocs., 840 F.2d 1096, 1101-02 (2d Cir.) (ruling that a racial quota that forced blacks to wait ten times longer for housing than whites had a discriminatory effect on housing availability for minorities), cert. denied, 488 U.S. 946 (1988); Steptoe, 674 F. Supp. at 1319 n.7 (stating that the issue is not whether the center's activities constituted steering, but whether they could have adversely affected the availability of housing to minorities).
496. See supra notes 379-82 (discussing the district court's use of the Arlington Heights multifactor test to analyze the legality of the Housing Center's affirmative marketing plan).
498. See id. at 1320 (holding that because the counseling center did not engage in the provision of housing, it could not have made housing unavailable).
499. See supra notes 342-44 and accompanying text (discussing the difference between non-profit and for-profit affirmative marketing efforts).
crucial importance to the legality of the Housing Center plan was that it merely supplemented normal marketing activities, and did not supplant them. The Seventh Circuit paid lip service to this issue, but ignored analyzing this crucial point. Had the realtor cut back on normal advertising of the property in order to make it more economically feasible to undertake the special outreach efforts, the affirmative marketing plan may have had a disparate impact on the ability of minorities to receive information about the Apache Street properties as compared to white homebuyers. This disparate impact could render the properties “unavailable” to black homebuyers in violation of the Fair Housing Act.

Because affirmative marketing focuses on potential customers, not actual customers or applicants, it is difficult to even determine the specific group of minorities affected by the affirmative marketing plan. Determining whether an affirmative marketing plan has a disparate impact on minority home seekers requires that the traditional discriminatory effect tests be refined to take into account the unique statistical analysis problems posed by measuring potential customers as opposed to actual customers. Determining the exis-

500. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1078 (N.D. Ill. 1988), aff'd in part and rev'd in part, 935 F.2d 868 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992); see Gelber, supra note 104, at 925 (asserting that outreach activities are legal to the extent they supplement, as opposed to supplant, traditional marketing activities).

501. The Seventh Circuit merely stated that the plan involved no lessening of efforts to attract black home buyers to the properties. South-Suburban Hous. Ctr., 935 F.2d at 884. It did not discuss how it arrived at the conclusion there was no decrease in efforts. See also South-Suburban Hous. Ctr., 713 F. Supp. at 1087 (stating that the affirmative marketing did not deprive anyone of housing information, but not addressing how it reached that conclusion).

502. But cf. Almonte v. Pierce, 666 F. Supp. 517 (S.D.N.Y. 1987). Unlike the plaintiff in South-Suburban Housing Center, the housing agency in Almonte made a conscious choice not to advertise the housing project in hispanic media because the group was not underrepresented in the community as defined by HUD regulations. Id. at 527. The district court upheld the program, reasoning that the lack of advertising did not deny hispanics housing since they were the group “least likely to apply to this particular project, and thus requiring special outreach.” Id. at 529. The Almonte court did not indicate that there was any lessening of efforts to attract hispanic tenants. Id. at 528-29.

503. In contrast, occupancy quotas provide a definitive group of actual customers upon whom discriminatory effects can be measured. See supra notes 255-57 and accompanying text (discussing the discriminatory effects flowing from the Starrett City integration maintenance program).

504. See Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987 (4th Cir. 1984) (holding that the correct inquiry is whether the policy in question had a disproportionate impact on minorities in the total group to which the policy was applied).

505. Cf. Ragan v. New York Times Co., 923 F.2d 995 (2d Cir.). cert. denied, 112 S. Ct. 81 (1991). Ragan supports the use of nontraditional tests to measure discriminatory effects. The case involved a discriminatory advertising claim, involving potential customers, under § 3604(c) of the Act. The Second Circuit held that the statute prohibited all ads indicating a racial preference
tence and/or extent of a disparate impact on the availability of housing information to minorities requires analyzing three factors. First, the court should determine what constitutes "normal" marketing of a property for a particular defendant, and also what constitutes the defendant realtor's normal customer pool. Second, the court should determine whether the use of normal marketing channels or the extent of their use was curtailed with respect to the property in question. Finally, if a decrease in normal marketing is shown, the court must determine if and to what degree the normal customer pool was deprived of information about the properties because of the decrease.

This factor essentially requires the court to calculate the extent black demand for the properties was reduced as a result of the de-

"whatever the advertiser's intent." Id. at 1000. The court held that the test for liability was whether "an ordinary reader would understand the ad as suggesting a racial preference." Id. at 1002.

506. See infra text accompanying notes 507-09. The court must first determine that there is a need for a special outreach program. The predicate for a special outreach effort is a determination that a group is unlikely to apply because of past discrimination or current real estate practices. Fair Housing Hearings, supra note 15, at 177 (statement of Alexander Polikoff); see supra notes 323-26 (discussing HUD's directive on how to formulate an affirmative marketing plan). Calculating which groups are least likely to apply may be accomplished at least in part by measuring past demand for properties in the area.

507. Realtors have widely varying marketing strategies, depending on their size and budget, degree of establishment in the community, as well as general economic activity. David Block, A Guide to Effective Real Estate Advertising (1981). The most widely used media is the classified ads, which have been "the backbone of real estate advertising for generations." Bruce W. Marcus, Marketing Professional Services in Real Estate: Advertising, Promotion, Public Relations 35 (Realtors Nat'l Marketing Inst. ed., 1981).

Other types of marketing media include metropolitan newspapers, suburban newspapers, penny savers, direct mail flyers, billboards, and for-sale signs, among others. Id. at 158. It is possible to estimate the potential customer pool from analyzing the type of media used. Factors for analysis include the circulation of the media, the demographics of the readership, the day of the week advertised and the size and frequency of the ads. Id. at 55-56, 161.

508. Potential measuring sticks include analyzing whether the frequency of classified ads was decreased, or whether less flyers identifying the property were mailed out than usual. However, it is important to determine what media has the greatest reach, and therefore the greatest ability to affect the normal customer pool if deprived. For instance, for-sale signs "are one of the most effective and least expensive types of advertising". Block, supra note 507, at 162-66. If homes in the area are often sold by word of mouth or to casual passersby, removal of for-sale signs could have a profound effect on the flow of information to the normal customer pool. Id.; cf. Andrew Fegelman, City Segregation Moves to Suburbs: Blacks Frozen Out of Some Areas, Chi. Trib, Feb. 27, 1991, §2, at 4 (reporting that many black home-seekers use informal networks like talking to friends and relatives, as opposed to normal marketing channels).

509. This factor requires prior analysis of the racial makeup of normal customer traffic for properties in the area. See infra note 575 (noting that the National Association of Realtors encourages brokers to compile racial data on homeseeker traffic).
crease in normal marketing efforts.  The method approved by *Huntington Branch, NAACP v. Town of Huntington* for measuring disparate impact, whether the action adversely affected a greater percentage of blacks than whites, is ill-suited for use in this situation. The affirmative marketing plan by its very nature is designed to positively affect whites; thus, there is no way to compare any adverse effect between the races. A better formula can be derived from the Title VII "minority underrepresentation" test, which compares the black population on a particular job site with the black population in the available labor pool. Using this formula, courts must compare the amount of black homeseeker traffic for the affirmatively marketed property to normal black traffic for similarly situated properties within the targeted area. Utilizing the precedent of *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, a court should find a prima facie case of discriminatory effect only when the reduction in the flow of housing information towards the normal customer pool results in a significant decrease in black traffic attracted to the property. Additionally, the defendant realtor may have a business justification for any evident decrease or alteration in normal marketing activities. Therefore, a court will not be able to accurately determine decreases

510. However, "most advertising . . . is difficult to relate directly to results." *Marcus*, *supra* note 507, at 35. Other considerations, such as the economic climate, or the price and condition of a particular property, may affect the amount of customers attracted to the property independent of any decrease in the flow of information about the property.  
512. *Id.* at 938. *See supra* notes 197-99 (discussing the *Huntington* business necessity defense).  
513. The same logic holds true for the comparison of absolute numbers done in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The special outreach efforts are implemented to increase the absolute numbers of whites who are informed of the property, any comparison of traffic between black and white buyers would be meaningless in terms of measuring disparate impact.  
514. *See Mineberg*, *supra* note 147, at 164-66 (examining various statistical models for measuring whether a prima facie case of disparate impact has been established).  
515. The premise behind this test is that with a decrease in normal marketing, a lesser number of minorities will have access to information about the availability of the property. This logically should translate into a lesser black demand for the property. The black traffic is then compared to black traffic for normally marketed properties of similar characteristics in areas where the home traffic is predominantly black. If the absolute number of blacks visiting the affirmatively marketed property is significantly lower than the number visiting the control property, this indicates that the reduced numbers correlate with the reduction in normal marketing.  
516. 743 F.2d 1207 (7th Cir. 1984).  
517. *Id.* at 1209-10 (holding that Title VIII prohibits both direct discrimination and practices with significant discriminatory effects).  
518. *See supra* notes 197-99, 211 (discussing the business necessity defense to discriminatory effects claims).
with respect to isolated properties. Courts should generally find violations only with respect to marketing decreases resulting from aggregated affirmative marketing of properties.519

When looking at isolated instances of affirmative marketing, it is difficult to conceive how one could accurately measure any discriminatory effect caused by a decrease in normal marketing activities. However, the test has utility when it is used to examine large-scale affirmative marketing efforts, such as the efforts in Oak Park, Illinois, or Shaker Heights, Ohio. Both of these programs involve the cooperation of real estate brokers.520 These efforts are also operated by agencies and centers that, unlike the housing center in Steptoe v. Beverly Area Planning Ass’n, have substantial control over the actual provision of housing in the community.521 This creates a greater danger that reverse steering, or neutral actions with a disparate impact on the availability of housing for minorities, will occur.522 The proposed test provides a framework for monitoring this danger.

5. **The Affirmative Marketing Plan and its Effect on the Legal, Social and Political Tensions Created by Race-Conscious Integration Activities**

In addition to the legal problems created by large scale affirmative marketing efforts, these programs also exacerbate political and racial tensions between blacks and whites. Some sociologists claim the only way to attack resegregation is on a regional scale.523 But since one purpose of affirmative marketing is to disperse blacks throughout mixed communities,524 if affirmative marketing becomes


520. *Fair Housing Hearings*, supra note 15, at 113 (statement of Winston H. Richie) (stating that the largest private realtor in Ohio is cooperating with efforts to maintain stable integration in Shaker Heights and other suburbs of Cleveland); Firstman, *supra* note 101, at 7 (noting that in both Oak Park and Shaker Heights, the real estate industry, once a bitter enemy of integration, has evolved into a cooperative ally). Firstman further notes that brokers in Shaker Heights are paid a bonus if they sell a house to a buyer whose race is underrepresented in the community. Id.

521. See *Berry*, supra note 1, at 277-303 (discussing operation of the Oak Park Housing Center); Wilkerson, *supra* note 103, at A1 (discussing generally the cooperative public and private efforts to maintain integration in Shaker Heights, Ohio).

522. This is especially true where parties with control over the housing transaction process are provided financial incentives for engaging in pro-integration practices. See Firstman, *supra* note 101, at 7 (discussing bonuses paid to brokers making pro-integrative sales).


pervasive in society, blacks will be constrained to live in white dominated communities.\(^{526}\) This will necessarily dilute black political power, and inflame racial tensions between blacks and whites.\(^{526}\)

Apart from any legal or political conflicts, detractors also argue that the Park Forest affirmative marketing program creates racial tension by reinforcing stereotypes about blacks. These programs are usually instituted to combat the threat of tipping, which involves a rapid all-white to all-black turnover in a neighborhood or community.\(^{527}\) Thus, affirmative marketing concentrates on keeping whites from moving out.\(^{528}\) Opponents argue that this mentality stigmatizes blacks by intimating that blacks bring in crime and reduce property values.\(^{529}\) However, the nature of affirmative marketing is less likely to stigmatize minorities than other race-conscious strategies. Affirmative marketing does not involve face-to-face customer contact, it instead reaches out to draw in potential, as yet unidentified customers. The plan is designed to stimulate multiracial demand for a property, and it does not contemplate any desired racial makeup in the community.\(^{530}\) Any stigma carried by this technique will thus be somewhat attenuated.

In contrast, housing counseling involves direct customer contact, and the message that certain racial groups are preferred in certain areas is reinforced directly to the customer. The use of financial incentives creates even more social and racial conflict. Financial incentives are usually based on a certain targeted racial composition in the community.\(^{531}\) Thus, there exists a subtle message that blacks are welcome, but not too many of them.\(^{532}\) Opponents argue that

\(^{525}\) Note, supra note 105, at 954-55.
\(^{526}\) See supra notes 127-30 and accompanying text (discussing the political tensions created by race-conscious integration programs).
\(^{527}\) See supra notes 114-16 and accompanying text (defining racial tipping).
\(^{528}\) Note, supra note 105, at 955.
\(^{529}\) Firstman, supra note 101, at 7 (examining opposition to affirmative marketing in Park Forest, Illinois); see supra notes 124-26 (discussing the social tension created by race-conscious integration programs). But cf. Comment, Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition, 90 YALE L.J. 377, 398-99 (1980) (asserting that the long-term benefits interracial housing would provide to blacks outweighs any stigma associated with these programs).
\(^{531}\) See generally Thomas, supra note 285 (discussing eligibility requirements for pro-integrative subsidized loans).
\(^{532}\) Housing Ruling, supra note 312, at 1.
rewarding whites for moving into a community and blacks for moving out sends the powerful message that the community will do anything to get whites to move in. They assert the city is essentially bribing whites to live next to blacks. This reinforces the stereotype that blacks are inferior to whites.

However, the decision in *South-Suburban Housing Center* implies that the racial and political tensions created by race-conscious programs must be subordinated to the integration goal of the Fair Housing Act, unless the programs intentionally discriminate against certain racial groups, or have a discriminatory effect on them. The sponsors of the Fair Housing Act recognized that an integrated society is a stable society. Additionally, the Kerner Commission noted that segregated living patterns perpetuate black inequality. The implication behind the integration goal of the Fair Housing Act is that only through sustained, stable integration will blacks receive social acceptance and political empowerment. Affirmative marketing programs like the one in *South-Suburban Housing Center* provide an effective mechanism for reaching this goal.

6. *A Caveat for For-Profit Affirmative Marketing Programs*

Affirmative marketing becomes increasingly effective as efforts are coordinated on a large scale. The use of private, for-profit realtors, who directly control the housing transaction process, also enhances the effectiveness of affirmative marketing. The realtor's ready and direct access to the marketplace provides a useful mechanism for fulfilling the purpose of affirmative marketing—stimulating multiracial demand for housing. However, realtors should only play a supporting role in the affirmative marketing process, like the role played by Century 21 in the effort by the South-Suburban Housing Center. Nonprofit fair housing agencies or local governments should be the central participant.

The reason for requiring agency participation is that realtors, although they may favor the use of special outreach efforts as an...
ideal, are primarily motivated by economics. The economic motivation can easily conflict with the equal housing opportunity goal of the Fair Housing Act when marketing expenditures are analyzed. The court in *South-Suburban Housing Center* held that the Housing Center's affirmative marketing plan was legal, because it directed additional information at certain groups but did not lessen the use of normal marketing channels. Thus, the broker is required to spend additional funds to successfully thread the tension between the Act's dual purposes of promoting integration and preventing discrimination. This may work for isolated affirmative marketing efforts, but when conducted on a widespread and continuing basis, it will likely lead the broker to *supplant* normal marketing activities in order to financially accommodate the affirmative advertising costs. This lessening of normal marketing efforts, even if not purposeful, will reduce the availability of housing information to minorities, and may deny or make unavailable housing in violation of section 3604(a) of the Act.

The solution to this legal dilemma is to have nonprofit housing centers financially support the special outreach efforts conducted by the private realtors. Most housing centers are supported by various corporations and grants these. These funds can be appropriated to reimburse the realtors for their additional expenditures. This will ensure that maximum demand is stimulated, and that there is additional traffic attracted to the property, *not substitute traffic*. Utilizing this method of financing special outreach efforts will reduce the liability exposure of realtors, and still provide the unique skills realtors can bring to the affirmative marketing process. This ultimately will encourage more realtors to participate.

In conclusion, the Seventh Circuit correctly concluded that the Housing Center's affirmative marketing program did not violate the Fair Housing Act. No evidence suggested that normal marketing activities were lessened to accommodate the special outreach efforts. However, the Seventh Circuit's reasoning failed to distinguish the inherent difference between nonprofit fair housing agency use of affirmative marketing as opposed to its use by for-profit realtors. Fu-

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538. *Id.* (reasoning that affirmative marketing may be an effective selling tool because the of the additional competition created for the property).

539. *Id.*

540. Because most special outreach programs are directed at whites, lessening normal marketing will mean lessening the flow of information to black homebuyers. *See supra* notes 114-19 (discussing tipping).
ture courts must take into account the possibility that discriminatory effects against minority access to housing information may result when the entity providing the affirmative marketing services also controls the housing transaction process.

B. Denial of Access to the Multiple Listing Service

The Seventh Circuit implied that a multiple listing service may treat access for one property differently than for another, depending on how the property is marketed. If a realtor does not market a property in a color-blind fashion, the multiple listing service may exclude it, even if the marketing method is permitted by the Fair Housing Act. The multiple listing service need only assert a philosophical disagreement with affirmative action in order to be protected from liability under the Act. Through its ruling, the Seventh Circuit may have unwittingly made itself a partner to the perpetuation of segregation. The multiple listing service is a "vehicle for maintaining segregation," and some realtor boards may assert a "philosophical disagreement" as a pretext for continuing segregated practices. In addition, in some urban areas an overwhelming amount of housing transactions involve the use of the multiple listing service. Thus, without access to the multiple listing service, an affirmative marketing effort is unable to fulfill its purpose of stimulating a multiracial demand for housing.

1. Brokerage Service Discrimination Under Section 3606

The Seventh Circuit observed that the issue of whether the Board restricted access to its multiple listing service "on account of race" was an issue of first impression. In analyzing this issue, the Sev-
enth Circuit's reasoning closely followed established Title VII affirmative action doctrine, which holds that private employers do not have a duty to integrate their workforce.\textsuperscript{547} In \textit{South-Suburban Housing Center}, the Seventh Circuit analogized that, in the housing sector, private realtors are not required to cooperate with the affirmative action efforts of another realtor.\textsuperscript{548} In contrast, when analyzing the legality of the affirmative marketing plan itself, the Seventh Circuit appeared to distance itself from a rigid adherence to the Title VII/Title VIII analogy.\textsuperscript{549} The Seventh Circuit correctly held that private entities should not be required to adopt affirmative sales practices. Statutory construction and prior court interpretations of the Act show that under Title VIII, only certain public entities have an affirmative mandate to integrate.\textsuperscript{550} Also, prior courts have properly recognized that imposing a duty to integrate on private entities would expose them to an unacceptable liability risk for housing patterns beyond their control.\textsuperscript{551} However, in holding that to compel the Board to list the properties would force it to cooperate in affirmative action efforts, the Seventh Circuit defined cooperation much too broadly. This definition does not comport with the liberal construction given the Fair Housing Act by the Supreme Court.\textsuperscript{552} In \textit{Metropolitan Housing Development Corp. v. Village of Arlington Heights},\textsuperscript{553} the Seventh Circuit looked to the Supreme Court's \textit{Trafficante} mandate that courts give a broad construction to the language of Title VIII, and concluded that close cases should be decided in favor of integrated housing.\textsuperscript{554} Under this mandate, the Seventh Circuit should have defined what constitutes cooperation more narrowly, so that the private right to remain color-blind and the affirmative marketing plan at issue could have been interpreted as congruent with each other.

The multiple listing service issue was argued under an intentional discrimination theory.\textsuperscript{555} However, the Seventh Circuit failed to ap-

\textsuperscript{547} International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).
\textsuperscript{548} \textit{South-Suburban Hous. Ctr.}, 935 F.2d at 886.
\textsuperscript{549} See supra notes 450-64 and accompanying text.
\textsuperscript{550} See supra notes 67-69 and accompanying text.
\textsuperscript{551} See supra note 73 and accompanying text.
\textsuperscript{552} See \textit{Trafficante v. Metropolitan Life Ins. Co.}, 409 U.S. 205, 209 (1972) (reasoning that congressional policy can be carried out only by a broad and generous construction of the language of the Fair Housing Act while remaining within constitutional limits).
\textsuperscript{553} 558 F.2d 1283 (7th Cir. 1977), \textit{cert. denied}, 434 U.S. 1025 (1978).
\textsuperscript{554} \textit{id.} at 1294.
\textsuperscript{555} \textit{South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors}, 935 F.2d 868, 885.
ply the disparate treatment standard of review to the facts. This standard of review was articulated earlier in the *South-Suburban Housing Center* opinion, when the court analyzed the legality of the affirmative marketing plan itself. Quoting *Village of Bellwood v. Dwivedi*, the Seventh Circuit held disparate treatment meant treating a person differently because of race, implying consciousness of race and having a purpose to use race as a decision-making tool. But the court did not explicitly state whether removing the Apache Street listings involved a purpose to use race as a decision-making tool. The court only stated that they could not "fathom" how the facts could constitute illegal discrimination. Actually, the Board did use race as a decision-making tool. In providing access to its multiple listing service, it treated properties promoted by an affirmative racial marketing strategy less favorably than those marketed traditionally. In particular, the Board objected to marketing that made a special effort to interest additional white homebuyers in the property.

The Seventh Circuit holding that a color-blind marketing strategy cannot constitute discrimination on account of race under section 3606 appears to set up the use of color-blind marketing policies as a defense to actions that treat persons differently because of race. Under the disparate treatment standard of review, a defendant may rebut a prima facie case of disparate treatment by articulating a legitimate and supportable reason for his actions, as long as it is not

556. 895 F.2d 1521 (7th Cir. 1990).
557. *South-Suburban Hous. Ctr.*, 935 F.2d at 888 (quoting Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-30 (7th Cir. 1990)).
558. *Id.* at 884.
559. The district court held that the decision by the Board to limit multiple listing service access was not motivated by racial considerations but by a strong philosophical disagreement with the marketing plan. *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 713 F. Supp. 1068, 1079-80 (N.D. Ill. 1988), *aff'd in part and rev'd in part*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992). This reasoning is also flawed, as the philosophical disagreement was itself motivated by racial considerations. *See supra* notes 124-35 (discussing various political and theoretical objections to the use of race-conscious programs).
560. Contrast this situation with one where a multiple listing service that has adopted a color-blind marketing scheme denies access to properties in predominantly white neighborhoods because it objects to special outreach efforts to black homebuyers. This action might violate the Fair Housing Act by perpetuating segregation. *See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1281, 1289-90 (7th Cir. 1977) (holding that neutral conduct that has the effect of perpetuating segregation and preventing interracial association will be considered invidious discrimination), *cert. denied*, 434 U.S. 1025 (1978).
a mere pretext for discrimination.\textsuperscript{561} No evidence showed that the philosophical disagreement with affirmative action was only a pretext for discrimination. However, the right to adopt a color-blind marketing policy is bound up with the precept that private entities do not have a duty to integrate and do not have to cooperate with the integration activities of another person.\textsuperscript{562} Thus, using a color-blind marketing strategy as a defense to disparate treatment is supportable only where the defendant's discriminatory actions were taken to avoid cooperating in another party's affirmative action efforts. Listing the Apache Street Properties in the multiple listing service did not require the Board of Realtors to cooperate in the Housing Center's affirmative marketing plan.\textsuperscript{563} Therefore, asserting a philosophical disagreement with affirmative action did not legitimately rebut the inference of disparate treatment created by the Board's removal of the listings from its multiple listing service.

The district court explicitly ruled that listing the Apache Street properties in the multiple listing service did not require the Board to cooperate in any of the Housing Center's affirmative marketing activities.\textsuperscript{564} The Housing Center was solely responsible for all outreach activities; all the Board had to do was list the properties in its multiple listing service pursuant to its previous contract with Century 21.\textsuperscript{565} Other brokers subscribing to the multiple listing service were free to ignore the property and its affirmative marketing efforts.\textsuperscript{566} Although the Board had a deep philosophical disagreement with the Housing Center's affirmative marketing activities, listing the properties in the multiple listing service did not compel it to adopt or conduct activities opposed to its philosophical bent, or

\textsuperscript{561} See supra notes 160-64 (discussing defenses to intentional discrimination claims).

\textsuperscript{562} See supra notes 218-20, 236 and accompanying text (discussing integration duties of private employers and housing suppliers).

\textsuperscript{563} See infra notes 564-67 and accompanying text (discussing why listing the properties did not constitute forced cooperation with the Housing Center).

\textsuperscript{564} South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1077 (N.D. Ill. 1988), aff'd in part and rev'd in part, 935 F.2d 868 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992). Realtors showing the Apache Street properties were required to list the race of the customers shown the houses. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 873 (7th Cir. 1992), cert. denied, 112 S. Ct. 971 (1992). This might be construed as requiring cooperation. But see South-Suburban Hous. Ctr., 713 F. Supp. at 1097 (noting that the National Association of Realtors strongly encourages data collection by realtors).

\textsuperscript{565} South-Suburban Hous. Ctr., 713 F. Supp. at 1097. There was no reference in the listing to affirmative marketing or special outreach. Id. at 1077.

\textsuperscript{566} Id. at 1077.
which furthered the plaintiff's affirmative marketing efforts.\textsuperscript{687} The special outreach activities undertaken by the Housing Center and Century 21 did not utilize the multiple listing service. Listing the Apache Street properties in the multiple listing service merely facilitated the effective use of normal, color-blind marketing channels.\textsuperscript{688}

Title VII precedent also supports the position that what constitutes cooperation should be narrowly construed. Although private employers may not be required to adopt affirmative action programs under Title VII,\textsuperscript{689} the Supreme Court has held that a voluntary agreement between two parties that peripherally affects a third party does not require the third party's consent to become operative.\textsuperscript{670} In \textit{International Ass'n of Firefighters v. City of Cleveland},\textsuperscript{671} the Supreme Court ruled that an affirmative action consent decree entered into between the city and a minority firefighters organization that altered previous agency hiring practices did not require prior consent from the firefighters union.\textsuperscript{672} The majority reasoned that it imposed no legal duties or obligations on the union, and did not bind it to any particular conduct.\textsuperscript{673}

The effect of the consent decree in Firefighters on third-party responsibilities closely parallels the effect of the Housing Center-Century 21 affirmative marketing program. Like the consent decree, the Housing Center's affirmative marketing plan imposed no legal duties or risk of liability on the Board.\textsuperscript{674} It also did not compel the

\textsuperscript{567} See \textit{id.} at 1080 (noting that, if anything, denying use of the multiple listing service would make it more difficult to sell the homes to blacks). Therefore, denying multiple listing service access would not contravene the realtors' color-blind marketing policy, and might actually impede its effectiveness.

\textsuperscript{568} See \textit{Fair Hous. Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.}, 422 F. Supp. 1071, 1074-75 (D.N.J. 1976) (explaining how the multiple listing has a pervasive influence on the housing market, noting that one-half of all transactions in area involved use of the listing service).


\textsuperscript{570} \textit{Local no. 93, Int'l Ass'n of Firefighters v. City of Cleveland}, 478 U.S. 501, 528-29 (1986); \textit{cf. Denton v. Int'l Bhd. of Boilermakers}, 630 F. Supp. 55 (M.D. Mass. 1986) (ruling that a union disagreement with a company's affirmative hiring program did not justify refusing to let blacks hired under the program take a promotional exam, whereas whites with less experience were allowed).

\textsuperscript{571} 478 U.S. 501 (1986).

\textsuperscript{572} \textit{id.} at 528-29.

\textsuperscript{573} \textit{id.} at 529.

Board to perform any particular activities with respect to the Apache Street properties.\textsuperscript{575} Like the consent decree, requiring the Board to list the Apache Street properties would only prevent it from thwarting the effectiveness of the Housing Center-Century 21 agreement.\textsuperscript{576} Concededly, the consent decree is not perfectly analogous to the private contractual arrangement entered into by the Housing Center and Century 21, because it grew out of litigation and allowed the third party to air objections to it before it was adopted.\textsuperscript{577} But although the consent decree is not directly on point, \textit{Firefighters} is a Title VII affirmative action precedent, and Title VII reasoning is routinely used to interpret the legality of actions taken under the Fair Housing Act.\textsuperscript{578} As stated previously, courts require that Title VIII be given a generous construction to effectuate its purposes, which includes promoting integrated housing.\textsuperscript{579} Thus, \textit{Firefighters} supports the view that a narrow construction of what constitutes cooperation will most effectively further the integration goal of the Fair Housing Act without unduly trammelled private rights.

In conclusion, \textit{South-Suburban Housing Center} should be interpreted as allowing a private entity to withhold services from a second realtor only if the services would directly support specific affirmative action efforts undertaken by the second realtor.\textsuperscript{580} The key

\textsuperscript{575} \textit{Id.} The affirmative marketing plan did require Century 21 to provide a racial breakdown of customers shown the house by other brokers that were part of the multiple listing service. This did not require the Board or other realtors to assist the Housing Center and Century 21 in its affirmative marketing activities; the National Association of Realtors, as part of its HUD-NAR VAMA, “strongly urges local boards and Realtors to collect and maintain data on the race of homesseekers served.” \textit{South-Suburban Hous. Ctr.}, 713 F. Supp. at 1097; \textit{cf. Fair Housing Hearings, supra} note 15, at 26 (Polikoff stating that gathering racial data is essential to any technique used to further the purposes of the Fair Housing Act).

\textsuperscript{576} \textit{Firefighters} noted that valid claims related to the consent decree could still be litigated by nonconsenting intervenors. \textit{Firefighters}, 478 U.S. at.529-30. Since the Board did not have any valid legal objection to the affirmative marketing program, it would not be able to block the marketing efforts merely by withholding its consent to them.

\textsuperscript{577} \textit{Id.} at 529. In contrast, the Board of Realtors did not have an opportunity to object before the special outreach program was implemented.

\textsuperscript{578} See supra notes 142-47 and accompanying text (discussing the evolution of the Title VII standard of review).

\textsuperscript{579} See supra note 66, text accompanying note 554 (discussing the liberal construction given to the Fair Housing Act).

\textsuperscript{580} These services would include making references in the multiple listing to the property’s being affirmatively marketed. \textit{See South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors}, 713 F. Supp. 1068, 1077 (N.D. Ill. 1988), \textit{aff’d in part and rev’d in part}, 935 F.2d 868 (7th Cir. 1991), \textit{cert. denied}, 112 S. Ct. 971 (1992) (noting that the Apache Street listing contained exactly the kind of information published about all the other homes).
issue is whether the broker services provide an essential vehicle for the special outreach efforts.\textsuperscript{581} Providing services that only support a realtor's traditional activities should not be interpreted as constituting cooperation with affirmative action efforts. Thus, a realtor organization that withholds traditional brokerage services from a broker because of the broker's affirmative marketing efforts would discriminate on account of race in violation of section 3606 of the Act.

2. Interference with Housing Rights Under Section 3617

Like section 3606, section 3617 presents relatively uncharted territory under the Fair Housing Act. South-Suburban Housing Center presents the first "reverse" interference case under section 3617, which prohibits interfering with housing rights protected under sections 3603-3606 of the Fair Housing Act.\textsuperscript{582} South-Suburban Housing Center involved a claim that the Board of Realtor's unlawfully interfered with the Housing Center on account of its having aided or encouraged white homebuyers in the exercise of their housing rights.\textsuperscript{583}

The Seventh Circuit held that under the factual circumstances of South-Suburban Housing Center, a section 3617 claim would not be successful if the plan did not also violate the prohibition against brokerage service discrimination contained in section 3606.\textsuperscript{584} This ruling does not comport with section 3617 precedent.\textsuperscript{585} A number of courts have held that a section 3617 interference claim violation may occur without a simultaneous violation of another section of the Fair Housing Act, especially when the defendant does not interfere directly with the plaintiff's exercise of housing rights, but on account of having exercised them.\textsuperscript{586}

\textsuperscript{581} See id. (noting that the Housing Center did not place references in the multiple listing service publication about special outreach efforts connected with the property). That type of reference would make the multiple listing service a vehicle for the Housing Center's affirmative marketing efforts).

\textsuperscript{582} 42 U.S.C. § 3617 (1988) (prohibiting interference with "any right granted or protected by 3603, 3604, 3605, or 3606 of this title"); see supra notes 47-54 and accompanying text (discussing the scope of § 3617).


\textsuperscript{584} Id. at 886.

\textsuperscript{585} See supra note 57 (explaining the different legal standards that apply depending on whether the interference occurred during an attempt to exercise a protected right or afterwards).

\textsuperscript{586} E.g., Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir. 1975); Stirgus v. Benoit, 720 F.
The Seventh Circuit relied on a footnote in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*\(^{588}\) to support its ruling that where the same conduct is alleged to have violated both sections 3606 and 3617, the ruling on the section 3606 claim is dispositive of the section 3617 claim.\(^{588}\) The *Arlington Heights* footnote stated that under the circumstances of that case, where the village had voted not to rezone land in order to permit a planned low-income housing development, the village's conduct could constitute interference with protected housing rights only if it also denied or otherwise made housing unavailable under section 3604(a).\(^{589}\) The *South-Suburban Housing Center* court stated that "[t]he same reasoning is apropos here."\(^{590}\) However, the court did not explain why the present factual circumstances justified the same standard as that in *Arlington Heights*. Remember, *Arlington Heights* involved an exclusionary zoning claim and the alleged interference by the Village in failing to rezone was alleged to simultaneously make housing unavailable to minorities.\(^{591}\) In contrast, the interference in *South-Suburban Housing Center* came after a housing right had already been exercised. Thus, the recent decision in *Stackhouse v. DeSitter*\(^{592}\) appears more closely analogous to the situation in *South-Suburban Housing Center*.

*Stackhouse v. DeSitter* involved the firebombing of a car belonging to a black home buyer who had recently moved into an all-white Chicago neighborhood.\(^{593}\) In ruling that this conduct violated section 3617, the district court ruled that a Section 3617 violation may be established in the absence of another substantive violation of the Act.\(^{594}\) Otherwise, the district court said, section 3617 would be rendered superfluous.\(^{595}\) It noted that section 3617 prohibited three separate actions: interfering with a person in the exercise of his housing rights, interfering *on account* of his having exercised or enjoyed a

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587. 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).  
589. *Arlington Heights*, 558 F.2d at 1288 n.5.  
590. *South-Suburban Hous. Ctr.*, 935 F.2d at 886.  
593. *Id.* at 211.  
594. *Id.* at 210-11.  
595. *Id.* at 210.
right, or interfering on account of his aiding or encouraging another in his housing rights. The Stackhouse court indicated that only where conduct is alleged to directly interfere with contemporaneous efforts to exercise housing rights will the validity of a section 3617 violation depend on whether the conduct also violates another substantive prohibition of the Fair Housing Act.

Like the defendant in Stackhouse, the Board of Realtors did not directly interfere with the Housing Center in the exercise or enjoyment of any housing rights. Instead, the realtors interfered after the Center had aided and encouraged white homebuyers in the exercise of their housing rights by making special outreach efforts to them. The Seventh Circuit is correct that the multiple listing service denial did not interfere with the Housing Center's contemporaneous efforts to make special outreach efforts to whites. Those efforts were made independent of the multiple listing service. The interference came in the form of denying normal marketing channels to Century 21 after Century 21 implemented an affirmative marketing plan to encourage whites in the exercise of their housing rights. This interfered with the ability of the Housing Center to sell the properties. Thus, the realtors' interference did not prevent the Housing Center and Century 21 from aiding white homebuyers in

596. Id. at 210-11.
597. Id. at 211 (noting that the interference came after the plaintiff had already exercised his right to live in an integrated neighborhood); accord Seaphus v. Lilly, 691 F. Supp. 127, 138-39 (N.D. Ill. 1988) (approving reasoning in Stackhouse).
598. South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 874 (7th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992) (noting that the denial of the multiple listing service access came after the Housing Center had encouraged whites to exercise their housing rights by making special outreach efforts to them); Stackhouse, 620 F. Supp. at 211 (noting that defendants interfered on account of plaintiff having enjoyed or exercised a housing right).
599. South-Suburban Hous. Ctr., 935 F.2d at 884. The Seventh Circuit held that the Housing Center had "failed to demonstrate interference with the aiding or encouraging of other persons in the exercise of rights under the Fair Housing Act." Id. at 886 (emphasis added). This statement incorrectly states both the law and plaintiff's claim. The Housing Center did not allege contemporaneous interference with the aiding of others, but on account of its aiding and encouraging of others. Petitioner's Opening Brief at 42-43, South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors (7th Cir. 1991) (Nos. 89-2122, 89-2177), cert. denied, 112 S. Ct. 971 (1992). This interference does not necessarily have to be directed at thwarting the efforts of encouragement, but can also constitute a retaliatory response tangential to plaintiffs' efforts. See Stackhouse, 620 F. Supp. at 209 (stating that the firebombing not done to thwart attempted integrative move; move had been made already; action taken in retaliation for the integrative move, in hopes of detering future exercise of housing rights); see also Meadows v. Edgewood Mgmt. Corp., 432 F. Supp. 334 (W.D. Va. 1977) (noting real estate employee disciplined for refusing to discriminate against minorities); SCHWEMM, supra note 15, § 20.2(4), at 20-11 to 20-12 (discussing independent grounds for § 3617 liability).
600. See supra note 45 (discussing how the multiple listing service is an effective selling tool).
the exercise of their housing rights;\(^{601}\) it came in response, or even retaliation, for aiding them.

In *South-Suburban Housing Center*, the court improperly equated interference and discrimination as legitimate, permissible non-cooperation. Future courts facing this issue should heed the reasoning in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,\(^ {602}\) which stated that "if the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be overly solicitous when the effect is to perpetuate segregation."\(^ {603}\) In *South-Suburban Housing Center*, the Board was seeking to protect the private rights associated with color-blind adherence to the Fair Housing Act.\(^ {604}\) If the Board were repeatedly to deny multiple listing service access to brokers who affirmatively market properties, this could have a discriminatory effect on the availability of housing information to minorities.\(^ {605}\) Because use of the multiple listing service is critical to effective home sales,\(^ {606}\) restricting access to the service may force the broker to abandon the special outreach efforts in order to regain access.\(^ {607}\) This allows a realty organization to use the marketing advantage of the multiple listing service to force individual brokers to adhere to a race-neutral marketing policy, a policy which unfortunately tends to perpetuate segregation.\(^ {608}\) Future courts, when at-

\(^{601}\) Preventing direct exercise of housing rights in this case would have involved denying *South-Suburban Housing Center* advertising space in the Southtown Economist newspaper, or refusing to allow the Housing Center to post flyers for the properties in factories employing mostly white workers.

\(^{602}\) 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

\(^{603}\) Id. at 1293.


\(^{605}\) *See id.* (noting that cooperating brokers in the service had no affirmative marketing obligations themselves, and also knew the racial makeup of Apache Street and the fact that there was little white demand).

\(^{606}\) *See supra* notes 536-37 (discussing the marketing power associated with cooperative listing between brokers).

\(^{607}\) *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 884 n.13 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992) (observing that evidence showed that as a result of the litigation involving the affirmative marketing plan, Century 21 was forced to abandon the special outreach provisions and market the property normally).

\(^{608}\) *See Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133 (2d Cir. 1973) (noting race-conscious strategy was essential to avoid resegregation); Wilkerson, *supra* note 103, at 7 (quoting Donald Demarco, Shaker Heights Housing Director, as stating "integration does not just happen . . . . Color blind or race neutral efforts simply do not work. They almost always result in resegregation."); *supra* notes 105-06 (noting that successful integration requires conscious efforts
tempting to promote the integration goal of the Fair Housing Act, should give little deference to the exercise of these types of private rights.609

IV. IMPACT

The Seventh Circuit's ruling that affirmative marketing plans are legal "'removes a cloud that the real estate industry has dragged over this concept.'"610 Affirmative marketing involves both housing counseling and targeted advertising efforts.611 The likely effect of South-Suburban Housing Center will be to increase the perception that race-conscious programs in general are legitimate ways of promoting integration. This in turn will lead to increased use of such programs, and in particular, lead to increased use of racially targeted marketing by private groups in an effort to attract persons to residential areas where their racial group is underrepresented.

Overall, South-Suburban Housing Center will not dramatically increase the use of these plans. Thousands of affirmative marketing plans were already in place prior to this ruling, most operating without legal challenge.612 This indicates most people did not perceive them to be discriminatory. However, the reasoning of the court is likely to further reduce challenges to them.613 The Seventh Circuit required proof of discriminatory motive in order to prove an affirmative marketing plan constituted illegal steering under the Act.614 This standard is very hard to meet because overt racial animus has largely disappeared in the housing industry.615


610. Shnay & Campbell, supra note 313, at 1 (quoting Alexander Polikoff). Polikoff's statement came after the Supreme Court's decision to deny the Board of Realtors' petition for writ of certiorari. Id.


613. The decision in South-Suburban Housing Center did not reduce criticism of the Housing Center's housing integration efforts. Political and philosophical disagreement with these plans still remains strong. Civil Rights leaders assert that the decision raises "'disturbing' questions about how a community may determine its ideal or acceptable racial composition. Shnay & Campbell, supra note 313, at 8. Opponents of affirmative marketing argue that the term affirmative action is misleading because there is a "'connotation there that African-Americans are spoilers in a community and that European-Americans are needed to keep a community stable.'" Id. (quoting Delores Whiter, president, NAACP-Far South Suburban Branch).


615. Metropolitan Hous. & Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1281, 1288
The types of plans most likely to increase as a result of South-Suburban Housing Center are the large-scale cooperative efforts between government, nonprofit fair housing agencies, and/or for-profit realtors. The Seventh Circuit explicitly endorsed such efforts as promoting robust, multiracial competition for housing.\(^6\) Oak Park, Illinois, and Shaker Heights, Ohio, have shown that maintaining stable integration on a long-term basis is possible through joint cooperation between government and private groups. Oak Park, adjoining a virtually all-black neighborhood of Chicago, has successfully combatted the threat of tipping. Its minority population has risen from 11% in 1980 to only 18% in 1990.\(^6\) Similarly, Shaker Heights, adjacent to a Cleveland ghetto, has seen its minority population remain stable at 24-30% over the last ten years.\(^6\) South-Suburban Housing Center removes the legal uncertainty surrounding these large-scale efforts, and may provide the impetus for other municipalities and regions to become fair housing pioneers. Nonprofit fair housing agencies, for instance, no longer have to worry about funding expensive challenges to litigation in addition to funding fair housing strategies.

South-Suburban Housing Center does not, however, guarantee that stable integration will result from the use of affirmative marketing efforts. South-Suburban Housing Center dealt with comprehensive efforts to stabilize integration in Park Forest, a community containing neighborhoods with a single-family character. This type of neighborhood, populated largely by homeowners as opposed to renters, is an asset in maintaining integration, since there is less population transition.\(^6\) Park Forest still saw its black population rise from 12% to 25% from 1980 to 1990.\(^6\)

\(^6\) (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).
\(^6\) South-Suburban Hous. Ctr., 935 F.2d at 884.
\(^6\) Chicagoland Census Report (Cook County), supra note 2, at 8.
\(^6\) Yale Conference, supra note 100, at 91 (statement of Donald DeMarco); see also Fair Housing Hearings, supra note 15, at 103-04 (statement of Winston H. Richie) (stating that through the use of race-conscious housing techniques, the Cleveland area inner-ring suburbs of Shaker Heights, Cleveland Heights and University Heights have enjoyed a stable racial mixture for over twenty years).
\(^6\) Berry, supra note 1, at 238. An example of the difference is culled by comparing the Chicago neighborhoods of Beverly and South Shore. Beverly, where 90% of the residences are single family, has experienced a relatively stable racial mix in the last 20 years. In contrast, South Shore, where 77% of all residences are apartments, experienced rapid resegregation over a five-year span in the late 1960s and early 1970s. Id.
\(^6\) Chicagoland Census Report (Cook County), supra note 2, at 8. In contrast, the neighboring municipality of University Park, which also attempted integration efforts, saw its black popu-
Another important factor in maintaining successful integration is the education level, income level, and sense of community of the population.\(^{621}\) Thus, not every area is amenable to race-conscious housing techniques, although Oak Park has proved that maintaining stable integration in areas with a high concentration of rental units is possible.\(^{622}\) The success of both Oak Park and Shaker Heights is due to certain positive characteristics they have in common. Both are solidly middle class communities with good school systems,\(^{623}\) and neither community has public housing.\(^{624}\) The high level of social and community services provided by the communities acts as a buffer to tipping.\(^{625}\) By contrast, in racially transitional communities without integration plans, resegregation can happen with alarming quickness.\(^{626}\)

The decision in *South-Suburban Housing Center* does present problems for for-profit groups wishing to engage in affirmative marketing activities. The Seventh Circuit's ruling that one realtor does not have to cooperate with another realtor's affirmative marketing plan will limit the number of private realtors and home sellers willing to engage in direct affirmative marketing measures, particularly in metropolitan areas. Property sales in metropolitan areas depend heavily on the use of the multiple listing service.\(^{627}\) Without listing service access, the market exposure of the property is reduced and it will likely take longer to sell.\(^{628}\) Thus, in an area of strong realtor resistance to race-based housing strategies, there is a strong economic motive on the part of both realtors and home sellers to avoid affirmative marketing plans in order to retain access to the multiple

\(^{621}\) *Berry*, supra note 1, at 239-40.

\(^{622}\) See supra note 287 (discussing the Oak Park Housing Center).

\(^{623}\) *Firstman*, supra note 101, at 7-8.

\(^{624}\) Id.

\(^{625}\) See supra notes 137-39 (discussing tipping criteria in general and, in particular, stating that the level of services in a community directly correlates with its tipping point).

\(^{626}\) See Chicagoland Census Report (Cook County), supra note 2, at 8. (noting that the Village of Bellwood, near Oak Park, saw its black population jump from 35% to 75% from 1980 to 1990).

\(^{627}\) See Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 447 F. Supp. 838, 841-42 (E.D.N.Y. 1978) (noting that the multiple listing service concept is an effective tool for promoting integrated housing by providing a means of widely circulating home listings); supra notes 45,543-45 (discussing the influence of the multiple listing service on the urban marketplace).

\(^{628}\) *Wheatley Heights*, 447 F. Supp. at 841-42.
listing service. The lack of realtor participation in affirmative marketing will reduce the impact *South-Suburban Housing Center* will have on the effectiveness of pro-integration measures, since realtors' direct control over the housing transaction process gives them greater influence over shaping racial patterns. The reluctance of individual brokers to utilize affirmative marketing tools depends on the position that the large realtor networks and organizations take regarding race-conscious marketing. Not all realtor networks oppose affirmative marketing as vociferously as the Greater South Suburban Board of Realtors. For example, the largest real-estate company in Ohio (Realty One) has begun to implement pro-integration tactics. In addition, in most areas there is not a single dominant multiple listing service that controls the distribution of housing information, and in many cases multiple listing services compete with each other for business.

Fortunately, the *South-Suburban Housing Center* affirmative marketing plan is not the only method of maintaining stable integration. Housing counseling programs like the one in *Steptoe v. Beverly Area Planning Ass'n* have proved successful in promoting nontraditional moves, without raising the issue of compelling cooperation from other parties. House counseling is not directly involved in the real estate market, so unlike the Housing Center plan, this type of program does not seek to directly influence real estate transactions. The information house-counseling programs distribute to interested parties is culled predominantly from public sources, such as real estate advertisements. Counseling programs like these will continue to grow, especially since they do not raise the specter of causing properties to lose access to the multiple listing service, the

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629. See *supra* notes 342-44 and accompanying text (discussing for-profit versus nonprofit fair housing efforts).

630. *Fair Housing Hearings, supra* note 15, at 50-51 (statement of Winston H. Richie). Richie argues that with universal approval of affirmative marketing tactics among realtors in an area, another selling tool is created. Property values (and commissions) increase as demand for each property rises. Id. at 54-55 (statement of Winston H. Richie).

631. See *Blake v. H-F Group Multiple Listing Serv.*, 345 N.E.2d 18, 22-23 (Ill. 1976) (noting that during the 1970s, at least three multiple listing services were operating in the south suburban area of Chicago).

632. See *Berry, supra* note 1, at 231-52 (discussing the successful efforts to prevent racial transition in the Chicago neighborhood of Beverly-Morgan Park, and noting that it requires a permanent, continuing effort to maintain racial balance).

633. See *supra* note 343 (discussing how private realtor affirmative marketing, unlike nonprofit efforts, can make housing "unavailable" on the basis of race).

634. *Berry, supra* note 1, at 231-52.
dominant marketing mechanism in many urban areas.

Although the court did not explicitly distinguish between public and private affirmative marketing efforts, in *South-Suburban Housing Center*, the court’s ruling that realtors are bound only to color-blind marketing practices indicates that ordinances requiring realtors to engage in special outreach efforts will likely be invalidated.\(^6\) This can impede integration efforts because the wider the scale an affirmative marketing program operates on, the more successful it will be in maintaining racial balance.\(^6\)

Another impact of the *South-Suburban Housing Center* decision will be to encourage more use of pro-integration financial incentives.\(^6\) This race-conscious method has been subject to little overt controversy so far.\(^6\) Pro-integration financial incentives are attractive because they directly counter the economic fear that influences many people to make segregative choices.\(^6\) By providing positive economic influences, such as mortgage assistance or rehabilitation subsidies, to landlords willing to promote integrated housing, communities encourage stable integration and prevent white flight.\(^6\)

For instance, through the use of subsidized pro-integration loans in the predominantly black Lomond neighborhood of Shaker Heights from 1984 to 1988, sales to white homebuyers increased from 49% to 69%.\(^6\) The reasoning in *South-Suburban Housing Center* could make these incentives even more attractive. The Seventh Circuit explicitly upheld affirmative action efforts designed solely to maintain racial balance in housing.\(^6\)

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\(^6\) See *supra* notes 335-37 (describing Park Forest South mandatory integration ordinance).

\(^6\) See *Civil Rights Commission*, *supra* note 74, at 63 (arguing that a patchwork of ordinances (or private efforts) will not achieve lasting results).

\(^6\) See *supra* notes 283-304 (discussing generally pro-integration incentives).

\(^6\) See *supra* note 291 (discussing the scarcity of litigation or comment regarding pro-integration financial incentives).

\(^6\) See *Milgram*, *supra* note 288, at 99-100 (noting that much of white prejudice is based on the fear that property values will decline and property crime will rise as blacks move into a formerly segregated neighborhood).

\(^6\) See *supra* notes 284-305 and accompanying text (discussing pro-integration incentives); *see also* 87 Op. Ohio Att’y Gen. 095 (1987), *reprinted in* FAIR HOUSING—FAIR LENDING: EQUAL HOUSING OPPORTUNITY, at PH 23,003. The Ohio Attorney General approved a temporary three month plan where the state finance agency could set aside 10% of its funds to promote integration by making low-interest loans available for cross-purchasers in segregated areas. The only eligibility requirement was racially neutral, a desire to live in an integrated environment. *Id.* at PH 23,008. The plan was officially designed to alleviate manifest racial imbalance, not to maintain integration. *Id.* at PH 23,010.


\(^6\) *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 883-84
VII maxim that affirmative action shall not be used to maintain racial balance in the workforce. Agencies that were formerly careful to point out that their financial incentive programs were only temporary may now be able to implement a continuing plan without fear of liability under Title VIII.

However, South-Suburban Housing Center will not afford these incentive programs protection to the extent it protects affirmative marketing measures. South-Suburban Housing Center dealt with the availability of housing information to potential customers. In contrast, financial incentives involve concrete sums of money and their availability to identifiable customers. Measuring discriminatory effect is much easier with financial incentives than with housing information. The reality is whites have much easier access to this money. There is economic disparity between blacks and whites, and in Shaker Heights many blacks cannot afford to buy homes in all-white areas, even when subsidized loans are available. Conversely, integrated housing tends to be the most affordable. Thus, ninety percent of all the pro-integration loans go to whites. Thus, even though the plan is facially neutral, the disparity in access to the loans between blacks and whites may create a discriminatory effect in violation of the Fair Housing Act.

In sum, the South-Suburban Housing Center decision has stepped into the shoes long unfilled by HUD: setting policy and interpreting the Act’s application to private race-conscious housing programs. Unlike Title VII, which has extremely detailed regulations interpreting the statute’s provisions, the regulations promulgated under Title VIII are very general; HUD has largely taken a hands-off approach to formal regulations governing affirmative action housing

644. See supra note 632 (noting that the Ohio Attorney General approved a statewide mortgage-incentive program on the basis that it was temporary in duration and designed to achieve integration); see also Thomas, supra note 285 (noting that a Wisconsin mortgage incentive plan was instituted not to maintain integration, but to desegregate schools).
645. See supra note 289 and accompanying text.
647. Id.; see also Firstman, supra note 101, at 7 (noting the economic disparity in Oak Park, where 80% of the black population lives in the apartment buildings comprising half the housing stock).
649. See supra notes 297-303 (discussing criticism of financial incentives as an integration tool).
practices under the Act. For instance, while waiting for Congressional direction, HUD has remained neutral on the use of financial incentives, and has published no specific regulations regarding private affirmative marketing efforts. South-Suburban Housing Center has stepped in to fill the congressional and regulatory void regarding race-conscious integration programs. The reasoning of the Seventh Circuit is sometimes incomplete, and its decision regarding multiple listing service access dilutes its endorsement of race-conscious housing strategies and the effectiveness of coordinated for-profit/nonprofit ventures. But on the whole, South-Suburban Housing Center provides welcome certainty to groups involved in promoting the integration goal of the Fair Housing Act. It explicitly states that special outreach efforts by private groups to certain racial groups does not constitute discrimination. The lasting impact is that private entities can continue to expand affirmative marketing efforts without fear of liability.

V. Conclusion

Affirmative marketing techniques have proved effective in promoting integrated housing, particularly when used in conjunction with antidiscrimination and community enhancement programs. Their use has also become a growing legal issue under the Fair Housing Act. Most of the prior litigation involving race-conscious housing programs involved the legality of housing quotas. But with most courts holding that quotas impermissibly promote integration at the expense of limiting minority access to housing, affirmative marketing techniques, long operating with little scrutiny, have moved into the legal "spotlight."

South-Suburban Housing Center is the first federal appellate decision to directly address the legality of private race-conscious affirmative marketing techniques. The scarcity of prior litigation over these programs, and the refusal by the Supreme Court to hear the Board of Realtor's appeal, indicates that future courts interpreting the legality of affirmative marketing programs under the Act

650. See SCHWEMM, supra note 15, § 10.4; see also 24 C.F.R. §§ 100.50 to 100.135 (1991) (describing certain practices that are illegal under the Fair Housing Act).
651. See supra notes 300-03 and accompanying text (discussing the HUD position on financial incentives).
652. See supra note 339 (discussing the HUD position on affirmative marketing).
653. 112 S. Ct. 971 (1992), denying cert. to 935 F.2d 868 (7th Cir. 1991).
will accord *South-Suburban Housing Center* significant precedential value. This will enable most plans to operate free from the threat of liability. However, future courts should scrutinize carefully the mechanics of affirmative marketing plans operated by for-profit realtors. The economic motivations of realtors pose some danger that affirmative marketing could cross the line into reverse steering.

The Seventh Circuit's decision also creates an uncertain future for affirmative marketing by private realtors. Although the Seventh Circuit endorsed the use of affirmative marketing by private for-profit realtors, it also allowed other real estate organizations that disagreed philosophically with these methods to thwart their effectiveness. Specifically, *South-Suburban Housing Center* allows other realtors to refuse to cooperate with the realtors' normal marketing activities directed at the properties. Catering to philosophical differences in this manner threatens to make these integration techniques "otherwise unavailable" to real estate brokers. Future courts analyzing this issue should carefully scrutinize whether one realtor's affirmative action efforts compel another realtor to act in a way contrary to its philosophy. If no actions are compelled, interference with affirmative marketing efforts, like the limiting of multiple listing service access in *South-Suburban Housing Center*, should be ruled illegal under the Fair Housing Act.

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