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**DESIGNING EFFECTIVE REMEDIES FOR DISCRIMINATION
IN FEDERALLY-ASSISTED HOUSING PROGRAMS:
A CASE STUDY OF NAACP, BOSTON CHAPTER V. HUD**

A paper by
Jonathan Pettus Hooks
submitted to
Professor Margo Schlanger

in fulfillment of the written work requirement of
HLS Course 95820-91: Institutional Reform Litigation.

May 24, 1999

I. Introduction

The seminal *Gautreaux* lawsuit,¹ which successfully challenged Chicago's discriminatory public housing siting practices, has provided a leading model for public housing desegregation litigation since 1969. In particular, much attention has been devoted to analyzing the effectiveness of the *Gautreaux* remedy, an extensive program which provided housing certificates² providing rent subsidies for some 7,100 minorities moving to predominantly white neighborhoods in Chicago and its suburbs.³ For more than two decades, social scientists and government agencies have examined the effect of the move on the lives of the minority families involved,⁴ finding such positive results that a nationwide HUD program, Moving to Opportunity, was modeled after the *Gautreaux* demonstration program. Significantly less attention has been given to examining why the *Gautreaux* plaintiffs were so successful in implementing the court-ordered remedy, particularly in contrast to the extremely high levels of resistance normally faced

¹ See *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907 (N.D. Ill. 1969); *Gautreaux v. Chicago Housing Authority*, 304 F.Supp. 736 (N.D. Ill. 1969). For descriptions of the case from its inception through the remedy phase, see ELIZABETH WARREN, *THE LEGACY OF JUDICIAL POLICY-MAKING: GAUTREAUX V. CHICAGO HOUSING AUTHORITY - THE DECISION AND ITS IMPACTS* (1988); Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451 (1988); A. Dan Tarlock, *Remedying the Irremediable: The Lessons of Gautreaux*, 64 CHI.-KENT L. REV. 573 (1988); Janet Koven Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57 (1994).

² In this paper, I refer to two separate programs jointly as Section 8 certificates and vouchers. The Section 8 Existing Housing Certificate Program "provides tenants whose homes cost no more than the federally prescribed Fair Market Rent (FMR) with a subsidy equal to the difference between 30% of their incomes and their rents." Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1335 (1995). In the Section 8 Housing Voucher Program, "voucher recipients receive the difference between 30% of their incomes and a hypothetical rent based on the applicable FMR for their area." *Id.* See 42 U.S.C. § 1437f(o). The difference in these programs is that the voucher program allows tenants to spend more than 30% of their income on rent to the extent they place their certificate in a unit above FMR. Both of these tenant-based programs are distinguished from project-based Section 8 subsidies, which are rent subsidy contracts issued by HUD for units in a specific project.

³ See Levit, *supra* note 1, at 75-76.

⁴ See, e.g., U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *THE GAUTREAUX HOUSING DEMONSTRATION: AN EVALUATION OF ITS IMPACT ON PARTICIPATING HOUSEHOLDS* (1979); James E. Rosenbaum, *Black Pioneers - Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 HOUSING POL'Y DEBATE 1179 (1991); Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. L. REV. 589 (1992); Florence Wagman Roisman and Hilary Botein, *Housing Mobility and Life Opportunities*, 26 CLEARINGHOUSE REV. 335 (1993); James E. Rosenbaum et al., *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux*

in desegregation litigation.⁵ Instead, to the extent the efficacy of the *Gautreaux* remedy is examined in legal literature, it is considered in the broad context of the legitimacy and effectiveness of using litigation to achieve institutional policy change.⁶

This paper seeks to build on this existing housing desegregation literature by examining more specifically how the choices made in the organization of an order or consent decree affect its prospects for effective implementation. In particular, I want to examine how remedies for discrimination and segregation in federally-subsidized housing programs can be designed to better serve the implementation goals of civil rights advocates. The recent implementation history of a five-pronged consent decree governing federally-assisted housing in Boston provides a good opportunity to evaluate the comparative effectiveness of different remedial provisions in a single case.

I begin this case study by presenting, in the following sections of Part I, a description of the dynamics of racial discrimination and segregation that have plagued federally-assisted housing programs, with special attention to the practices challenged in *NAACP, Boston Chapter v. HUD*. Next, Part II offers a history of the case, focusing on the factors that shaped the remedy ultimately won by the plaintiffs. Part III examines the successes and failures of several terms of the Consent Decree, drawing several lessons for civil rights advocates interested in maximizing the efficacy with which defendants implement obligations imposed pursuant to either court orders or consent decrees. Most importantly, I urge that advocates seek to establish remedial schemes that provide incentives for compliance not merely with the terms of a decree but also with its underlying desegregative goals; in addition, enforcement mechanisms must be created to

Participants, 12 J. POL'Y & MANAGEMENT 556 (1993).

⁵ See, e.g., *Spallone v. U.S.*, 493 U.S. 265 (1990) (describing resistance to desegregation order in Yonkers, New York); CHARLES M. HAAR, *SUBURBS UNDER SEIGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) (describing resistance of Mount Laurel to desegregation lawsuit).

establish a continuing procedural role for plaintiffs (or other monitoring bodies) in ensuring that implementation of remedial terms does not deviate from the substantive goals of the remedy.

A. The Dynamics of Segregation and Discrimination in Recent Programs⁷

The history of discrimination in federal housing programs has been well-documented in the literature on *Gautreaux* and elsewhere.⁸ In particular, since the turn of the century, forms of federally-funded discrimination have included the concentration of public housing in impoverished and predominantly minority areas;⁹ the segregation of tenants in the public housing¹⁰ (originally on a de jure basis)¹¹; the provision of housing in substantially worse condition and in less desirable neighborhoods to minority families;¹² disproportionate minority

⁶ For articles that undertake such analysis, see Levit, *supra* note 1; Polikoff, *supra* note 1; Tarlock, *supra* note 1.

⁷ Because this section is addressed only to segregative and discriminatory practices that had occurred by the time the *NAACP, Boston Chapter* case was litigated, I do not discuss discriminatory practices in more recent federal programs. For a discussion of the racially segregative dynamics in the Section 8 mobility certificate program, see Philip D. Tegeler, Michael L. Hanley and Judith Liben, *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 HARV. C.R.-C.L. L. REV. 451 (1995). Tegeler, Hanley and Liben offer an analysis of the Boston metropolitan area's Section 8 programs at 462-63. A discussion of Low Income Housing Tax Credit's failure to meet HUD's affirmative obligations to provide fair housing opportunities is provided in Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011 (1998).

⁸ See, e.g., cites at note 1; DOUGLASS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID* (1993); Schill & Wachter, *supra* note 2; Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351 (1995). In addition to their discussion of the segregation created and reinforced by a variety of federal programs, Massey and Denton also offer a powerful explanation of the role of racial segregation in the concentration of poverty and associated social ills.

⁹ See Schill and Wachter, *supra* note 2 at 1295; Roisman, *Response*, *supra* note 8, at 1356.

¹⁰ See Roisman, *Response*, *supra* note 8, at 1357-58 ("The historical and legal literature establishes that the single most powerful explanation for this exclusion and confinement of family public housing has been hostility to people of color, particularly blacks; and the historical and legal literature also establishes that the federal government has been fully complicit with the local agencies in that discrimination. Segregation in public housing and other federal programs continues. A recent HUD report confirms that 'most African Americans living in public housing live in a largely African-American and poor community, whereas whites, living in elderly housing, typically live in areas with large numbers of whites who are not poor.'").

¹¹ See Schill & Wachter, *supra* note 2, at 1295 n.45 ("[I]n the early years of the program, the federal government instructed the [local public housing authorities] to follow the 'neighborhood composition rule,' under which the racial composition of public housing developments was supposed to mirror their neighborhoods."); Roisman, *Response*, *supra* note 8, at 1357-58.

¹² See, e.g., Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 429-30 (1996) ("Widespread housing discrimination has not only restricted geographical and associational choices among most blacks; it has also negatively impacted the housing and neighborhoods available to low-income blacks.... Low-income black Americans often live in overcrowded and substandard housing conditions.... These conditions are particularly stark in the federally

displacement as a result of “urban renewal” development programs;¹³ and the home mortgage insurance programs.¹⁴

Despite this dubious history, conventional wisdom might hold that segregation in federally assisted housing has abated since the passage of the Fair Housing Act in 1968 and the Gautreaux and Shannon¹⁵ decisions requiring HUD to correct its discriminatory practices in 1969 and 1970, respectively. But despite these public commitments to desegregation, HUD’s performance in the 1970s and 1980s continued to demonstrate racial segregation and discrimination, albeit in new forms. One of the more significant discriminatory dimensions of federally-assisted housing programs might be termed “inter-program discrimination”: the disproportionate placement of minorities and whites with similar housing needs within different HUD programs.¹⁶ In particular, whites are disproportionately over-represented in newer HUD programs, typically less densely-situated, “scattered-site” units and mobility programs like

subsidized public housing program, which is profoundly segregated on the basis of race. Public housing inhabited primarily by blacks is also inferior in quality, services, location, and amenities as compared to publicly assisted housing occupied primarily by whites. Subsidized housing inhabited by blacks is usually located in declining, crime-ridden, central-city areas with high concentrations of poverty and little access to better schools, jobs, and social contacts that might foster upward mobility.”).

¹³ See Adams, *supra* note 12, at 438-39 (“The urban redevelopment program, in particular, had a devastating effect on the inner-city black population. The result of urban redevelopment was that entire square blocks of urban land were cleared, countless buildings were demolished, and thousands of black families were forced to move. Displaced residents were offered only priority placement on public-housing waiting lists. Furthermore, blacks began to occupy an increasingly larger proportion of public housing at a time when its overall quality was deteriorating. Because blacks were excluded from the suburbs and shunted into the least desirable areas of the city, public housing began to be perceived as the exclusive domain of black families.”). For descriptions of how urban redevelopment impacted Boston’s minority population through both displacement of minority residents and disinvestment in minority communities, see Marie Kennedy, Mauricio Gaston, and Chris Tilly, *Roxbury: Capitalist Investment or Community Development?*, in *FIRE IN THE HEARTH: THE RADICAL POLITICS OF PLACE IN AMERICA* 97 (Mike Davis *et al.*, eds. 1990); MEL KING, *CHAIN OF CHANGE: STRUGGLES FOR BLACK COMMUNITY DEVELOPMENT* (1981); JOHN MOLLENKOPF, *THE CONTESTED CITY* (1983); PETER MEDOFF AND HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 17-23 (1994).

¹⁴ See MASSEY & DENTON, *supra* note 8, at 51-55.

¹⁵ Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (requiring HUD to consider the impact of public housing siting decisions on the racial compositions of affected neighborhoods).

¹⁶ See generally Craig Flournoy & George Rodrigue, *Separate and Unequal: Illegal Segregation Pervades Nation’s Subsidized Housing*, DALLAS MORNING NEWS, Feb. 10, 1985, at 1A (whites and blacks experience widespread disparities when receiving the same or similar types of federal housing assistance).

Section 8 certificates (both more often located in predominantly white communities),¹⁷ while blacks are over-represented in older programs more likely to have units sited in areas of minority concentration.

A 1989 HUD report characterizes the locational superiority of these “new” programs and describes the relative increase of such units since 1970.¹⁸ In particular, “newer, privately owned developments are more than twice as likely to be located in the suburbs outside of central cities, with easy access to superior educational and employment opportunities. In addition, the newer developments tend to be in better condition, with more frequent maintenance and greatly enhanced facilities and services.”¹⁹ Furthermore, “the older public-housing developments are more likely to be located in central city areas in census tracts with higher poverty rates. Conversely, the newer project-based housing units tend to be located in communities with lower poverty rates.”²⁰ The interprogram racial segregation is considerable: “a higher percentage of blacks than whites live in the older, conventional public housing programs, while whites outnumber blacks in the newer Section Eight certificate and voucher programs and private, project-based programs.”²¹

At least in part, this distinction is due to the greater number of elderly projects built under

¹⁷ See Adams, *supra* note 12, at 440-46 (defining “new” HUD programs).

¹⁸ “Units occupied by private, project-based, subsidized tenants [are] newer than any of the other types of rental units, with 24 percent built since 1980 and 71 percent built since 1970. In contrast, only about 40 percent of public housing and certificate/voucher units were constructed since 1970.” Connie H. Casey, HUD Office of Policy Development and Research, *Characteristics of HUD-Assisted Renters and Their Units in 1989*, at 14 (1992) (quoted in Adams, *supra* note 12, at 441 n.112).

¹⁹ Adams, *supra* note 12, at 444 (citing Casey, *supra* note 18, at 15).

²⁰ Adams, *supra* note 12, at 442. “Sixty-nine percent of public housing units are located in central cities versus 55% of private project-based units.” *Id.* at 442 n.115 (citing Casey, *supra* note 18, at 15).

²¹ *Id.* at 441-42. “The [1989] Casey study found that blacks make up 53% of the persons receiving HUD assistance in public housing while whites represented only 44% of that number.” *Id.* at 441 n.113 (citing Casey, *supra* note 18, at 5). “In the certificate/voucher program, blacks represent 40% of those persons receiving HUD assistance, but whites receive 57% of the certificates or vouchers. The statistics are more lopsided for those receiving private, project-based assistance. According to HUD, whites comprise 66% of those receiving HUD assistance in project-based programs, while blacks account for only 30% of the total number.” Adams, *supra* note 12, at 442 n.114 (citing Casey, *supra* note 18, at 5). See also Roisman, *Response*, *supra* note 8, at 1359 (“whites ... reside in 57% of the

new programs and located in predominantly white neighborhoods. “Many of the white residents who occupy the private, project-based programs are elderly, whereas younger black families tend to live in units in the conventional public housing program.”²² Commentators have argued that this result is the product of racial animus; “[i]n fact, many localities chose to develop federally assisted, elderly housing as a way to limit black and Hispanic occupancy in those programs and their resulting entry into white neighborhoods.”²³

This interprogram segregation may be the ironic result of efforts to curb segregative siting of federally assisted projects. In 1972, HUD issued regulations²⁴ requiring that new developments be built outside of predominantly minority areas, except in special circumstances. Given the of the requirement to the demands of plaintiffs in fair housing lawsuits such as *Gautreaux* that federally-assisted housing be sited in nonimpacted areas, this regulation appeared poised to increase integrated housing opportunities. Instead, with continued deference to local government agencies in the siting and construction of such units, the regulation resulted in only a limited amount of integrated construction. As Professor Roisman has noted, “HUD’s current Site and Neighborhood Standard regulation on its face favors siting in nonsegregated, nonimpacted areas, although in reality the exceptions to the regulation have swallowed the general rule, and replacement units have been approved for segregated, poverty-concentrated locations.”²⁵

Perhaps unsurprisingly, given that the regulations were originally forced on HUD by the

subsidized, project-based housing”).

²² Adams, *supra* note 12, at 442. “Although only 34% of all households in public housing developments reside in elderly developments, they constitute 52% of all whites in public housing developments.” John Goering *et al.*, U.S. Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States: An Analysis of the Racial Occupancy and Location of Public Housing Developments* 2 (1994) (quoted in Adams, *supra* note 12, at 442 n.117).

²³ Adams, *supra* note 12, at 442.

²⁴ See 24 C.F.R. § 200.700 (1996).

²⁵ Roisman, *Response*, *supra* note 8, at 1371.

1970 decision in *Shannon v. HUD*,²⁶ HUD has been less than vigilant in enforcing them on local public housing authority (PHA) siting processes. In fact, “HUD has in the past interpreted these regulations so leniently, that in many instances, local PHAs have been permitted to locate a significant portion of assisted housing in racially concentrated neighborhoods.”²⁷ Until changes in 1993, the regulations were ineffective in constraining PHAs seeking to concentrate units in nonpredominantly white neighborhoods.²⁸

Furthermore, multiple administrative choices by localities have abetted placement of disproportionate numbers of whites in units that are located in predominantly white neighborhoods. First, although affirmative marketing requirements for assisted housing were imposed by HUD,²⁹ they were rarely undertaken by projects,³⁰ to put it more bluntly, “[t]he HUD-assisted programs’ affirmative marketing regulations are ignored.”³¹ Second, HUD permitted direct application to specific projects in preferred areas as opposed to requiring application to public housing authorities with municipality-wide or region-wide jurisdiction – resulting in segregation and its maintenance through choice-based tenant assignment plans,³² much the same result tenant selection and assignment plans (TSAPs) had created in public

²⁶ Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL’Y 209, 225 (1994).

²⁷ Tegeler, *supra* note 26, at 225-26.

²⁸ “Prior to 1993, HUD’s approach to determining whether a neighborhood was ‘minority concentrated’ was simply to compare the racial makeup of the neighborhood (usually a census tract) with the racial makeup of the PHA’s area of jurisdiction. Thus, if the neighborhood had a higher minority population percentage than the PHA’s area, HUD defined the neighborhood as an area of minority concentration. But because few central city PHAs have been given permission to operate in the suburbs, the ‘jurisdiction’ of the PHA is often limited to the boundaries of the city.” *Id.* at 226. “Predictably, HUD’s approach tended to create a higher percent definition of minority concentration than a regionally-based definition, particularly in cities that are racially separate from their suburbs. This approach permitted low-income housing to be located in neighborhoods with significant minority populations, and also contributed to racial segregation by making central cities more racially concentrated in relation to the suburbs with each new housing unit.” *Id.* at 226-27.

²⁹ See 24 C.F.R. §§ 200.620, 200.620(a).

³⁰ See Adams, *supra* note 12, at 443 (citing David Maxwell, *HUD’s Project Selection Criteria - A Cure for “Impermissible Color Blindness?”*, 48 NOTRE DAME L. REV. 92, 101 (1972)).

³¹ Roisman, *Response*, *supra* note 8, at 1359.

³² See Adams, *supra* note 12, at 443.

housing projects.³³ Local PHAs have also used their discretion to avoid the creation of multifamily developments or to limit those that were developed to predominantly minority neighborhoods; “many cities stopped building family projects altogether or significantly reduced production in favor of constructing elderly developments in an effort to reduce minority occupancy.”³⁴ In addition to using their discretion to slow or stop the development process, localities have also used zoning regulations to either prevent entrance of low-income multifamily developments or limit them to predominantly minority neighborhoods.³⁵

B. Segregation and Discrimination in the Boston Metropolitan Area

Though operating at a more discrete programmatic level, these segregative and discriminatory dynamics similarly characterized federally subsidized housing in Boston throughout the 1970s and into the 1980s, raising the ire of local civil rights organizations like the NAACP. Essentially, “[t]he problem was that the Boston housing market continued to be quite segregated and the federal government had made funds available over several years to address that. But the funds tended to be dedicated either to black or white communities, but not to integrated housing.”³⁶ In particular, the NAACP believed that “the City of Boston ha[d] used the resources given to them in a manner that reinforced segregation, violating language in the

³³ See *infra* text at note 43.

³⁴ Adams, *supra* note 12, at 443. Describing programs for funding the replacement of deteriorated public housing units, Professor Roisman notes that, “[i]n many situations, funding is available, but the actual provision of the replacement units is delayed because of political opposition to the siting of public housing units.” Roisman, *Response*, *supra* note 8, at 1371. In describing a recent episode in one city, she describes the resistance as motivated chiefly by racial animus: “In New Haven, Connecticut, for example, funding was available for replacement of the Elm Haven high-rise with scattered-site public housing, to be constructed or acquired in nonsegregated neighborhoods; although suitable sites were identified promptly, many years elapsed without significant progress toward replacing the units. As this example suggests, a principal obstacle to replacing units is opposition to having black public housing residents living in nonsegregated, nonghetto neighborhoods. The opposition is to the people, regardless of the kind of housing in which they live. The opposition is not to the people’s poverty: poor white people live in those neighborhoods without hindrance. The opposition is to the race and color of the would-be residents.” Roisman, *Response*, *supra* note 8, at 1371. PHA responses to construction requirements resulting from desegregation lawsuits are characterized by similar intransigence. See *infra* text at notes 168-185.

³⁵ See Adams, *supra* note 12, at 443-44.

³⁶ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

[federal] grant [agreements] that imposed an affirmative duty to do fair marketing; essentially, to produce something different than had been produced.”³⁷ Furthermore, the segregation being produced by the administration of these programs could not have escaped the notice of both local and federal administrators; “HUD and Boston should have known it was having that effect because there had been those complaints ... and there was information available to [the NAACP that] it had that clear effect.”³⁸

In testimony ultimately delivered at trial, Professor Philip Clay, the plaintiffs’ expert witness, described a variety of specific programs in which such discriminatory effects had occurred. First, Professor Clay noted, certain choices by Boston in the administrative of otherwise racially neutral programs tended to disproportionately exclude minority families. HUD’s Housing Improvement Program (HIP), for instance, had been developed as a way of responding to waves of racial and socioeconomic change, usually spurred on by bank loan “redlining” and unscrupulous “blockbusting” practices of real estate brokers, that had rapidly changed the character of neighborhoods in Boston and other large cities.³⁹ Policymakers responded to these disastrous situations with a subsidized home improvement loan program (HIP) intended to “strengthen neighborhoods” by maintaining ownership and home investment. Nationwide, these programs were normally funded through subsidizing loans to qualified homeowners in targeted neighborhoods of a city. However, Boston’s implementation of the program was exceptional in that it was funded through *rebates*; homeowners therefore had to

³⁷ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

³⁸ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

³⁹ For a description of such transitions in Boston, see Hillel Levine and Laurence Harmon, *Profits and Prophets: Overcoming Civil Rights in Boston*, 3 TIKKUN 45, 46-48 (1988). Professor Clay also noted in his testimony how this problem had been exacerbated to some extent by poor implementation of federal discrimination laws that put pressure on banks to lend in minority neighborhoods. As a result, brokers were able to get subsidies for families financially unable to support the burden of homeownership. This resulted in the sale of these homes to families whom the brokers knew would quickly default on the mortgages, enabling the brokers to turn properties over several times (each time accruing new brokering and closing fees), as well as buttressing the instability of the target

have their own capital and complete repairs in order to receive funding. Thus, the program favored those with access to capital - whites - and disadvantaged those without such access - disproportionately minorities; "the way the HIP Program was set up had an impact that assured white families would get loans and that black families in Roxbury would not get loans."⁴⁰ Though this dimension of the program had been raised as a problem by the Massachusetts Commission Against Discrimination, HUD had not taken steps to condition future funding on appropriate changes to the program.

The NAACP also witnessed a more directly segregative effect in another homeowner subsidy program; HUD's provision of federal funding for below-market interest rate loans through the Section 312 Program exacerbated residential segregation in one Boston neighborhood. A United South End Settlement Study found that the loans had been provided with racially-identifiable patterns in the South End; blacks were given loans west of Massachusetts Avenue, a major thoroughfare dividing the area, while whites were given loans east of it, resulting in a decrease in black homeownership. Prior to the Urban Renewal programs of the 1960s, there had been no such distinction in this racially-mixed area of Boston, and black homeownership had actually been fairly high. As Professor Clay noted, Section 312 loans were essentially used to make units available to whites in a gentrifying market.⁴¹ HUD's implementation of the 312 program also showed no concern for displacement (which negatively impacted the racial diversity of the area); it often funded new homebuyers rather than focusing on long-term homeowners. In summary, "programs like 312 had been funding gentrification."⁴²

neighborhoods.

⁴⁰ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

⁴¹ The only subsidized construction for minorities in the area during the 1970s was that built on "Parcel 19" by the Inquilinos Boricuas en Acción ("IBA"), a highly organized group of Puerto Rican tenants. Testimony of Professor Philip Clay in NAACP, Boston Chapter v. HUD, Civil Action No. 78-850-S, May 21, 1982.

⁴² Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

Because 312 provided such a deep subsidy, no income-based displacement needed to occur; the program could have funded any current occupants. Whether there was a significant discriminatory impact was to some extent a judgment call, Prof. Clay admitted, but no analysis was done by Boston or HUD to evaluate the impact of its program on neighborhood racial composition until December 1981, three years after the NAACP lawsuit was filed. Though the need to conduct an analysis was clear, and reiterated to HUD by local complaints, HUD again failed to conduct or require Boston to conduct such an analysis despite their knowledge of Boston's failure to do so.

Boston's administration of its public housing projects served both to increase segregation and to disproportionately harm minority families. First, racial steering in placements - both informally and formally - had lead to isolation of minorities in certain projects in overwhelmingly minority neighborhoods. In particular, through the 1970s and 1980s, Boston's Tenant Selection and Assignment Plan (TSAP) worked through multiple public housing waiting lists which permitted future tenants to choose which projects they wished to consider, exacerbating the degree of racial segregation. In fact, the TSAP was the subject of a separate NAACP suit, settled in 1989, which committed the BHA to a unified waiting list for public housing.⁴³ Widespread mismanagement of public housing had resulted in the BHA being placed in receivership⁴⁴ and a loss of approximately one-third (27%) of the units (reducing the total number in Boston to approximately 4,000 units).⁴⁵ This management failure had a disproportionate impact on minorities, who were more likely to be in public housing than in other forms of federally-subsidized housing.

⁴³ See NAACP, Boston Chapter v. Boston Housing Authority, 723 F. Supp. 1554 (D. Mass. 1989).

⁴⁴ See CHARLES M. HAAR AND LANCE LIEBMAN, PROPERTY AND LAW 436-482 (2d ed. 19xx) (describing Perez v. Boston Housing Authority, 379 Mass. 703 (1980), and related BHA receivership litigation).

⁴⁵ Testimony of Professor Philip Clay in NAACP, Boston Chapter v. HUD, Civil Action No. 78-850-S, May 21,

Furthermore, the residents of public housing generally mirrored the racial composition of the neighborhood in which it was placed. This was not merely a result of tenant assignment policies, but was also attributable to the fact that multifamily housing developments - units needed disproportionately by minorities - had not been constructed outside of impacted areas (*i.e.*, areas of minority concentration). Instead, most new construction was for elderly housing, and it was sited outside areas of minority concentration and filled with mostly white residents.⁴⁶ There was at least one clear procedural defect of Boston's siting process for new developments: it solicited proposals for developments without specifying particular neighborhood areas. Instead, developers were to propose their own sites, with the predictable result that developers, wishing to avoid neighborhood confrontation and keep real-estate prices down, would site multifamily developments in low-income areas and elderly projects in white areas. Professor Clay also cited the absence of an affirmative marketing plan as limiting the potential for racial integration of whatever new units were built outside areas of minority concentration. He noted that the three projects (Mission Park, Symphony Towers, Back of the Hill) that were reasonably integrated were so largely as a result of the efforts of resident organizations, rather than any action taken by the BHA. This suggested that HUD and the BHA were failing in the affirmative obligations imposed on them by Title VIII and related grant requirements.

Professor Clay also noted two other dynamics that had a racially discriminatory impact. First, Boston had also misallocated certain funds intended for multifamily use that were instead used for elderly housing, with a predictable disparate impact on minorities.⁴⁷ In addition,

1982.

⁴⁶ For instance, Professor Clay noted, then-recent projects such as Symphony Plaza and Back of the Hill apartments were both designated for elderly and handicapped housing. There were some exceptions to this pattern, of course, including Mission Park and some smaller developments which mixed multifamily and elderly (*e.g.*, the Hemenway apartments in the Fenway).

⁴⁷ Approximately 5,000 units of financially-troubled subsidized housing (*e.g.*, units in Section 8, Section 236, and Section 221(d)(1) programs) received new Section 8 funding for rehabilitation, which Boston then classified as new

portable Section 8 certificates were also being used by recipients in a manner that reinforced residential segregation; whites used them in primarily white neighborhoods, and minorities in minority neighborhoods. The BHA had taken no steps to alter this pattern and HUD had not used its funding authority to require the BHA to do so.

Unable through its repeated complaints to force HUD to correct the racially discriminatory impacts in Boston's implementation of these federally assisted housing programs, the NAACP began to search for new approaches to force HUD to meet its fair housing obligations.

II. NAACP, Boston Chapter v. HUD

A. The Plaintiff's Case

The April 6, 1978 award of some \$10.48 million under HUD's Urban Development Action Grant (UDAG)⁴⁸ program for two projects in Boston provided the NAACP the touchstone it needed to challenge in court HUD's tolerance of the BHA's discriminatory practices. The UDAG statute prohibited HUD from approving Boston's grant request without requiring that Boston take steps to ensure fair housing opportunities.⁴⁹ When, despite complaints of its failure to ensure that Boston met these conditions for grant eligibility, HUD proceeded to authorize the grant, the NAACP was prompted to take legal action.

The NAACP's complaint, filed in the U.S. District Court for the District of Massachusetts on April 17, 1978, alleged that HUD's disbursement of funds to Boston through the Community Development Block Grant (CDBG)⁵⁰ and UDAG programs "violate[d] HUD's

units provided, thereby double-counting these units. Boston was thereby able to use the money for elderly housing rather than spending it on the multifamily properties for which the funds were designated.

⁴⁸ See 42 U.S.C. § 5318.

⁴⁹ See NAACP, Boston Chapter v. Harris, 607 F.2d 514, 517 (1979).

⁵⁰ See 42 U.S.C. §§ 5301-5317.

duty to ensure minorities equal access to the benefits of funded projects.”⁵¹ The plaintiffs raised claims under a number of statutory provisions, as well as the Fifth Amendment to the Constitution.⁵² Most importantly, the plaintiffs argued, HUD’s continued funding of programs in Boston, despite its knowledge of the racially discriminatory effects of these programs, violated its affirmative duties under Title VIII of the Civil Rights Act of 1964. Title VII, codified at 42 U.S.C. § 3608(e)(5), obliged HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Act].”⁵³ Similarly, HUD had violated its own regulations in not requiring a minority needs assessment from Boston, a condition of the CDBG grant,⁵⁴ which would have limited its ability to meet its affirmative obligations. Analogously, the plaintiffs argued, HUD’s continued funding of programs with racially discriminatory effect placed it in violation of § 601 of Title VI of the

⁵¹ NAACP, Boston Chapter v. Harris, 607 F.2d 514, 516 (1979).

⁵² See NAACP, Boston Chapter v. Harris, 607 F.2d 514, 517 n.4 (1979). A recent article by Florence Roisman and Philip Tegeler describes at length causes of action available to plaintiffs in such cases, noting, in addition to the claims discussed above, potential state constitutional claims. See Florence Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People and People of Color*, 24 CLEARINGHOUSE REV. 312, 314-28 (1990). Roisman and Tegeler offer a detailed discussion on racially discriminatory disparate impact theories under federal law, in particular Title VIII. See *id.* at 314-15. They describe the requirements plaintiffs must meet under the standard of “pure effect” adopted by the Second, Third, and Eighth Circuits and left unchallenged in a partial affirmance by the Supreme Court, see *id.* at 315 (citing *Resident Advisory Bd. V. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-84 (8th Cir. 1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *review declined in part and judgment aff’d*, 109 S.Ct. 276 (1988)), and reject the hybrid four-factor effects and intent test the Seventh Circuit adopted in *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). See *id.* at 315-17. Roisman and Tegeler also offer a variety of theories under which a court could find an adverse impact on a particular minority group; for example, plaintiffs can assert that more minorities than whites are affected by a program choice, that minorities are disproportionately affected, or that minorities will be hurt more than whites by the same program choice. See *id.* at 317-19.

⁵³ The “polic[y] of the Act” is described at 42 U.S.C. § 3601 as the provision of “fair housing throughout the United States.” Roisman and Tegeler describe HUD’s affirmative obligations, noting that “[t]hese goals are ‘not precatory; HUD is obliged to follow these policies. Action taken without consideration of them, or in conflict with them, will not stand.’ HUD’s obligation affirmatively to promote fair housing is part of its obligation to consider and promote the national housing goals.” Roisman & Tegeler, *supra* note 52, at 326 (quoting *Pennsylvania v. Lynn*, 501 F.2d 848, 855 (D.C. Cir 1974)). Roisman and Tegeler also argue HUD can be made to meet “implied obligations” of Title VIII. In particular, they urge that the Supreme Court’s decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), should be extended from Title VII context to also imply that “HUD and other actors ... [must] not only ... eliminate future barriers to the equal participation of minorities in housing programs and developments, but also ... eliminate, compensate for, and overcome prior substantive inequality between minorities and whites.” Roisman & Tegeler, *supra* note 52, at 327.

Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d,⁵⁵ and § 109 of Title I of the Housing and Community Development Act of 1974, codified at 42 U.S.C. § 5309, which incorporated the nondiscrimination requirement into HUD's operation of the CDBG and UDAG programs.⁵⁶

Though his first major decision in the case, partially dismissing the claim for lack of standing, was reversed on appeal, Judge Skinner, the District Court judge, indicated early in the proceedings his reluctance to hear the controversial case.⁵⁷ Nonetheless, an eight-day trial was finally held before Judge Skinner, beginning on May 17, 1982. The crucial testimony at trial came from the plaintiff's expert witness, Philip Clay, Professor of Urban Affairs at MIT, who explained the dynamics by which HUD-funded programs had disadvantaged minorities in Boston and served to increase segregation in the city.⁵⁸

B. The Court's Holding

On April 27, 1983, nearly a year after the trial, Judge Skinner issued his opinion. He

⁵⁴ See 24 C.F.R. §§ 570.300(b)(2), 570.304(b).

⁵⁵ Section 601 of Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d, provides as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

⁵⁶ Though the NAACP chose not to include them in this suit for strategic reasons, participants in federal housing programs have similar affirmative obligations. Under the Housing and Community Development Act of 1974, recipients of Community Development Block Grants (CDBGs) must agree that "the grant will be conducted and administered in conformity with" Title VI and Title VIII, and that the grantee will "affirmatively further fair housing." Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. s. 5304(b)(2)). See Elizabeth K. Julian and Michael M. Daniel, *Separate and Unequal: The Root and Branch of Public Housing Segregation*, 23 CLEARINGHOUSE REV. 666, 672 (1989) (arguing that, if CDBG language "is given the same interpretation as the similar language in 42 U.S.C. § 3608, a municipality must go beyond its constitutional obligations in remedying segregated housing"). HUD regulations similarly require that the grantee "administer all programs and activities related to housing and community development in a manner to affirmatively further Title VIII." 24 C.F.R. § 570.601(b).

⁵⁷ Judge Skinner's January 2, 1979 partial dismissal for lack of standing would have removed the complaints relating to UDAG funds from the case. However, in short order, the plaintiffs prevailed in the court of appeals. Judge Campbell, writing for the First Circuit in October, 1979, reversed Judge Skinner and held that the NAACP had standing to proceed against HUD for failure to implement compliance with the non-discrimination provisions required by the UDAG program. See generally *NAACP, Boston Chapter v. Harris*, 607 F.2d 514 (1979). Earlier decisions by Judge Skinner included a denial of the NAACP's motion for a temporary restraining order to prevent the distribution of funds in the case. In addition, a later NAACP motion for a preliminary injunction was rejected by Judge Skinner in January 1981, citing both the defendant's "earnest effort to ensure that the CDBG program is conditioned on benefit to minorities" and a concern for the relative capabilities of the district court and the executive agencies to make decisions regarding the CDBG implementation. [NEED CITE]

accepted much of Professor Clay's testimony,⁵⁹ finding that "[r]acial segregation and racial discrimination in public and private housing prevailed in all sections of Boston throughout the period 1977 to the present."⁶⁰ Accepting Professor Clay's account of the recent history of the low-income housing market in Boston, Judge Skinner noted an increase in black population from 22% to 30% of the City between 1970 and 1980,⁶¹ and further found that "black households are more likely than white to be renters, family, and low income."⁶² Judge Skinner found that there was a "housing emergency in Boston"⁶³ (a vacancy rate in low-income housing of just 3.7%),⁶⁴ attributable in part to the loss of public housing units due to BHA mismanagement as well as gentrification of portions of the City.⁶⁵ He further agreed that "[t]he population of public housing projects follows the racial characteristics of the neighborhoods in which the projects are located. Most of the projects designed for low-income families are in black neighborhoods. Most of the projects in white neighborhoods are deigned for the elderly."⁶⁶ In addition, in apparent violation of its CDBG grant requirement, Judge Skinner noted that "the City has not established any mechanism for overall monitoring of fair housing practices."⁶⁷

Regarding the plaintiffs' specific program-based claims, Judge Skinner rejected Professor Clay's contentions regarding discrimination caused by the reimbursement feature of the HIP programs,⁶⁸ and similarly found insufficient evidence to conclude that the Section 312 program

⁵⁸ See *supra* text at notes 36-47.

⁵⁹ As Natasha Lisman, attorney for the NAACP, would later comment, "[Professor Clay] won the case for us." Conversation with the author, February 1, 1999.

⁶⁰ NAACP v. Harris, 567 F.Supp. 637, 640 (1983).

⁶¹ *Id.*

⁶² *Id.* at 641.

⁶³ *Id.* at 640.

⁶⁴ Notably, the vacancy rate for low-income housing in Boston during the 1990s has been even lower than 3.7%.

⁶⁵ NAACP v. Harris, 567 F.Supp. 637, 640 (1983).

⁶⁶ *Id.* at 641.

⁶⁷ *Id.*

⁶⁸ *Id.* at 642. Judge Skinner did note that HIP discrimination may have occurred in the South End, but seemed to suggest that problem had been cured when HUD required Boston to relocate an office to a more convenient location for South End blacks. See *id.*

was characterized by “deliberate racial steering.”⁶⁹ He did, however, appear to accept Professor Clay’s suggestion that HUD had improperly approved City actions that violated HUD’s requirements for new construction: “In approving the City’s annual reports, HUD has permitted the City to count rehabilitation of existing low-income family housing as if it were new construction, thus permitting the City to meet HUD guidelines even though new construction has disproportionately favored housing for the elderly in predominantly white neighborhoods.”⁷⁰

Although “[a]ll of [these] facts were well known to the officials of HUD responsible for Boston CDBG and UDAG programs from 1977 to the present time,”⁷¹ HUD never required the City to prepare the minority needs assessment its CDBG program mandated until 1981. HUD also required passage of a fair housing ordinance in 1981, although “there was no evidence of any continuing effort to secure such legislation.”⁷²

Despite these findings of fact, however, Judge Skinner reasoned that “[j]udicial intervention may not be based only on suspicion, no matter how historically justified,” and “conclude[d] that the evidence does not warrant a finding that HUD financed City programs that were either intentionally discriminatory or had a discriminatory impact.”⁷³ He therefore dismissed the claims under both Title I of the Housing and Community Development Act of 1974 and Title VI.

The 1983 opinion nonetheless did find two ways in which HUD had failed to meet its obligations under Title VIII. As Judge Skinner later summarized,

In my prior opinions, I found that HUD had failed to satisfy the minimum levels of compliance required by [42 U.S.C.] § 3608(e)(5) in two respects. First, the agency did not require the City to establish an effective fair housing enforcement

⁶⁹ *Id.* at 643.

⁷⁰ *Id.*

⁷¹ *Id.* at 641.

⁷² *Id.*

⁷³ *Id.* at 643-44.

program in the face of its knowledge of pervasive racial discrimination in the City. Second, despite its knowledge that a housing emergency existed which had a disproportionate impact on low income black families, HUD did not condition its provision of federal funds, specifically UDAG funds[,] on construction of affordable integrated public housing.⁷⁴

As a condition of the CDBG funds, the City was required to prepare a Community Development and Housing Plan, 24 C.F.R. § 570.300(b)(2), which was required to identify “any special needs of identifiable segments of the lower income population.” 24 C.F.R. § 570.304(b). Because Boston had never prepared such a minority needs assessment, and HUD had continued to provide CDBG funds, HUD was in violation of its own regulations.⁷⁵ “The failure to secure a minority needs assessment not only violates HUD’s regulations under Title I, but seriously impedes HUD in carrying out its statutory mandate under Title VIII ..., which requires HUD to promote fair (*i.e.*, desegregated) housing in all federally financed projects.”⁷⁶ In addition, Judge Skinner read HUD’s obligations under both Title VI and Title VIII to require the “financing of desegregated housing so that the housing stock is sufficiently large to give minority families a true choice of location.”⁷⁷ He found that, because HUD “has not used any of its immense leverage under UDAG to provide adequate desegregated housing,” that it did not minimally comply with Title VIII.⁷⁸ The Court of Appeals read this latter violation as “a violation of HUD’s Title VIII duty ‘affirmatively to further’ the Act’s policy.”⁷⁹

⁷⁴ NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 365 (1989) (citing NAACP, Boston Chapter v. Pierce, 624 F.Supp. 1083, 1085 (1985)).

⁷⁵ See NAACP v. Harris, 567 F.Supp. 637, 644 (1983).

⁷⁶ *Id.*

⁷⁷ *Id.* at 643-44 (citing Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Garret v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974)).

⁷⁸ *Id.* at 644.

⁷⁹ NAACP, Boston Chapter v. Sec’y of HUD, 817 F.2d 149, 151 (1st Cir. 1987). Both Judge Skinner and then the Court of Appeals rejected HUD’s claim that HUD “violate[s] its obligations under Title VIII only when HUD engages in discriminatory conduct or when it funds a grantee who is engaged in such discriminatory conduct with the purpose of furthering the grantee’s discrimination.” *Id.* at 154. Instead, “the history of Title VIII suggests that its framers meant to do more than simply restate HUD’s existing legal obligations [not to discriminate under the Fifth Amendment].” *Id.* Citing Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), and Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973), the First Circuit argued that ample precedent held that “Title VII imposes

After this qualified victory by the plaintiffs, two years passed without a remedial ruling from the court. Then, on December 31, 1985, Judge Skinner again approved a HUD motion to dismiss, this time for lack of jurisdiction.⁸⁰ First, he reasoned, because Boston had submitted a minority needs assessment to HUD on September 7, 1982, HUD's violation of its own regulations was no longer an issue in the case.⁸¹ More importantly, as to HUD's violation of its affirmative duties under 42 U.S.C. § 3608(e)(5), Judge Skinner held that the court had no subject matter jurisdiction under the Administrative Procedure Act (APA)⁸² or an implied private right of action under Title VIII to hear the case.⁸³ His reasoning on this jurisdictional issue clearly demonstrated Judge Skinner's view that court involvement in such cases of institutional malfeasance was often illegitimate and inefficacious; Judge Skinner was opposed to enforcing on the defendants any remedy that would compel them to exercise what he viewed as political decisions, which, even if they violated the agency's governing statute, were committed to the agency's sole discretion.⁸⁴

upon HUD an obligation to do more than simply refrain from discriminating." NAACP, Boston Chapter v. Sec'y of HUD, 817 F.2d 149, 155 (1st Cir. 1987). Even the limited construction of HUD's obligations in *Anderson v. City of Alpharetta*, 737 F.2d 1530 (11th Cir. 1984), considered it a violation of HUD's affirmative duties to fund programs without considering the effect of the HUD grant on the racial and socioeconomic composition of the neighborhood. See NAACP, Boston Chapter v. Sec'y of HUD, 817 F.2d 149, 156 (1st Cir. 1987). "[T]he need for such consideration itself implies, at a minimum, an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *Id.*

⁸⁰ NAACP, Boston Chapter v. Pierce, 624 F.Supp. 1083 (1985).

⁸¹ See *id.* at 1085.

⁸² 5 U.S.C. § 700 *et seq.*

⁸³ See NAACP, Boston Chapter v. Pierce, 624 F.Supp. 1083, 1093 (1985). In applying the *Cort v. Ash*, 422 U.S. 66 (1975), four factor test to determine whether an implicit private right of action under 42 U.S.C. § 3608(e)(5) to secure injunctive relief existed, see NAACP, Boston Chapter v. Pierce, 624 F.Supp. 1083, 1087-89 (1985), Judge Skinner "conclude[d] that an implied private right of action under 3608[(e)](5) is not consistent with the purpose of the Act to place responsibility for enforcement squarely on [HUD]." *Id.* at 1089.

⁸⁴ Judge Skinner held that the actions were unreviewable under the APA; raising the "threshold question of applicability of the APA which the parties have not argued," *id.* at 1090, he asked whether activities under 42 U.S.C. § 3608[(e)](5) were "committed to agency discretion by law" under 5 U.S.C. § 701(a). Adopting the *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970), framework, Skinner concluded that "the inappropriateness of judicial review of the issues in this case, and the likely negative impact on the effectiveness of the agency's operations outweigh the admittedly substantial need to safeguard plaintiff's interests in fair housing." *Id.* at 1093. Finding the matters thus "committed to agency discretion," Judge Skinner held that "HUD's actions under § 3608[(e)](5) are excepted from

The Court of Appeals disagreed, reversing Judge Skinner. Writing for the First Circuit on March 19, 1987, Judge Breyer noted that HUD did have a broad range of discretionary powers, but that “does not in itself mean that HUD is immune from review for ‘abuse of discretion’ in exercising those powers.... Rather, it simply means that a court is less likely to find against the agency, for the agency is less likely to have acted unlawfully.”⁸⁵ Given its holding that the APA authorized exercise of such judicial oversight, Breyer’s opinion offered some general guidelines to the District Court which, while taking note of the tradeoffs involved, nonetheless suggested the breadth of remedies available to the court:

Of course, the court faces the difficult task of avoiding both remedies that may be too intrusive, interfering with HUD’s ability to carry out its basic grant-awarding mission, and those that may prove to be ineffective. This difficulty is not, however, unsolvable. We do not see any reason why the court cannot effectively ensure HUD’s future responsible exercise of discretion while at the same time preserving for the agency its discretionary options.... In

judicial review.” *Id.*

⁸⁵ NAACP v. Sec’y of HUD, 817 F.2d 149, 157 (1st Cir. 1987). Instead, Breyer argued, for the APA’s § 701(a)(2) “committed to agency discretion by law” exemption from review to apply, “the question is whether Congress intended, or needed, in order to prevent unwarranted judicial interference with HUD’s efforts to carry out its various statutory activities, to preclude review of whether HUD’s pattern of behavior exceeds its fairly broad range of discretionary choice.” *Id.* Congress would not have intended to preclude review in this case, Breyer reasoned, citing a number of factors. First, “the right at issue – the right to HUD’s help in achieving open housing – is a significant one.” *Id.* The opinion further noted that “it seems reasonable to believe that plaintiffs wrongly deprived of that assistance over a course of time might require judicial intervention to obtain it.... Under all the circumstances of this case, the facts found by the district court (if true) strongly suggest a political process that has failed to offer plaintiffs adequate alternative relief.” *Id.* at 158.

Second, “the court can find adequate standards against which to judge the lawfulness of HUD’s conduct.” *Id.* Breyer elaborated: “Rather, here the court must decide whether, over time, HUD’s pattern of activity reveals a failure to live up to its obligation. The standard for reviewing that pattern can be drawn directly from the statutory instruction to ‘administer’ its programs ‘in a manner affirmatively to further the policies’ of ‘fair housing.’ 42 U.S.C. §§ 3608(e)(5), 3601. This standard, like many, may be difficult to apply to borderline instances, yet a court should be able to determine whether the agency’s practice, over time, in respect to this mandate has been ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. § 706(2)(A). Doing so, in the context of a claim of serious failure over time to try to further Title VIII’s goals, need not involve the court in ‘superintend[ing] economic and managerial decisions,’ *Hahn v. Gottlieb*, 430 F.2d at 1249, or in reweighing matters that Congress has asked HUD to balance. Rather, this case seems to call for a more straightforward evaluation of whether agency activity over time has furthered the statutory goal, and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory.” *Id.*

Third, the Court of Appeals “[did] not believe that judicial review of this kind of claim threatens unwarranted interference with HUD’s ability to carry out its basic statutory missions.” *Id.* at 159. Finally, “it does not seem impossible here for the court to develop an appropriate remedy.” *Id.* Thus, in contrast to Judge Skinner, Breyer and the Court of Appeals found that this case fell within the court’s sphere of competence.

formulating its remedy, of course, the district court may, as it has already done, seek the advice and participation of HUD.⁸⁶

Judge Skinner himself recognized that “the court of appeals described my remedial powers with celestial generality.”⁸⁷

C. Remedial Provisions

Nonetheless, in his Order on June 23, 1989,⁸⁸ more than two years following the First Circuit reversal, Skinner still opted to limit his remedial powers. Although granting the plaintiffs declaratory relief, he limited the relief he granted in a number of ways. Invoking concerns that onerous restrictions would discourage HUD from directing funding towards Boston and intrude upon Congressional funding authority,⁸⁹ Judge Skinner refused to order HUD to fund any new construction or rent subsidies, arguing that any order to HUD to provide funding would be barred by sovereign immunity and, furthermore, be “inconsistent with the statutory scheme for the implementation of the UDAG and CBDG programs.”⁹⁰ Further, though recognizing that the court of appeals had expressly noted that his remedial power included the power to compel HUD to issue regulations, he declined to require HUD to do so.⁹¹

⁸⁶ NAACP v. Sec’y of HUD, 817 F.2d 149, 159-60 (1st Cir. 1987) (citing *Louisiana v. United States*, 380 U.S. 145, 155-56 (1965)). Construing the District Court’s remedial power under the APA, Breyer further noted: “[T]he court may find authority to award relief under 5 U.S.C. § 706(2)(A), which empowers it to ‘hold unlawful agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ One can ... reasonably view the NAACP’s suit as one to ‘set aside’ HUD’s practice, which practice reflects an ‘abuse’ of HUD’s ‘discretion.’ This view is consistent with the statute..... [T]he words ‘set aside’ need not be interpreted narrowly. A court, where it finds unlawful agency behavior, may tailor its remedy to the occasion.” *Id.* at 160 (emphasis added).

⁸⁷ NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 366 (D. Mass. 1989).

⁸⁸ *See id.* at 370. The original order was supplemented on September 14, 1989 with a Clarification and Amendment of Judgement that served to define terms used in the original Order, such as affordable housing. *See id.* The Amendment also made it clear that the relief was to apply to “persons of color” and not merely “blacks.” *Id.* at 373.

⁸⁹ *See id.* at 367 (“In creating appropriate remedies, however, prudence requires the acknowledgement of certain political imperatives. The appropriation of funds for urban development is committed to Congress, and the allocation of such funds among the various sections of the country is committed to the discretion of the defendant. Imposition of restrictions that make Boston an unattractive candidate for federal funding may ultimately defeat the laudable purposes which the plaintiff seeks to achieve.”).

⁹⁰ *See id.* at 368.

⁹¹ Judge Skinner remarked, “I am very reluctant to add to the existing mountain of federal rules and regulations. I am only concerned with the specific local problems raised in this case. In my opinion the proper articulation of the

Skinner's original decree established several of the requirements around which the parties would later build a negotiated Consent Decree. First, Skinner's Order required HUD to condition future grant funding on the Commonwealth and the City's creation of a Boston Fair Housing Commission (BHFC) with effective enforcement powers.⁹² In addition to requiring the promulgation of enabling legislation by the City and State, the Order required the City to amend its Fair Housing Ordinance to "eliminat[e] the exemption of housing consisting of five or fewer units."⁹³ Second, while not providing for a specific amount of funding for subsidized housing construction or a minimum number of new units to be built, the Order required HUD to use "best efforts and available resources to increase the supply of affordable housing in the City."⁹⁴ Significantly, there was no provision for mobility certificates, the central remedy adopted in the seminal *Gautreaux* litigation.⁹⁵ Next, some measure of fair access to existing subsidized housing was sought by the portion of the Order requiring participation in an affirmative marketing program for all federally-assisted housing, among other ancillary programs. Finally, the order also prohibited any reductions in the number of existing affordable housing units. The court required semiannual reports from HUD and retained jurisdiction, but set up no specialized enforcement or monitoring scheme.⁹⁶

The defects of this original remedial scheme were clear, though many of its shortcomings would be incorporated into the Consent Decree as well. The Order sought to cure the problem of housing discrimination by local agencies who had historically acted to segregate housing by

conditions described above [fair housing enforcement and participation in an affirmative marketing program] in each grant of HUD funds will be sufficient to the occasion." *Id.* at 370.

⁹² *See id.* at 370-71. I omit detailed discussion of the terms of the District Court's Order here because they were roughly equivalent to the terms of the Consent Decree reached approximately a year later, with two major changes, the origin of which are discussed after the description of the Decree's terms.

⁹³ *Id.* at 371.

⁹⁴ *Id.* at 372.

⁹⁵ *See supra* text at notes 1-3 and sources cited therein.

⁹⁶ *See NAACP, Boston Chapter v. Kemp*, 721 F.Supp. 361, 372 (D. Mass. 1989).

leaving to them the discretion to implement affirmative integration efforts of law enforcement and marketing as a condition of their HUD grants. HUD was not required to establish any monitoring program or to mandate any minimal levels of effectiveness, and the court provided no ready monitoring or incentive scheme of its own. Though the Order on its face would require affirmative steps to end a history of discrimination that (the court found) had existed since at least 1977, it would provide no mechanisms of enforcement or incentives for compliance by the formerly discriminating agencies now charged with altering their practices. Furthermore, it did not even provide additional funding to cure the past harms which federally-sponsored segregation had created.

Both parties were dissatisfied with the Order and filed appeals. Given the uncertainty of the appellate process, however, the parties entered into settlement negotiations while they awaited hearing in the First Circuit. Against the backdrop of Judge Skinner's Order, the parties reached agreement on a Consent Decree, offered to the court in January 1991. When Judge Skinner approved it on March 8, 1991, both parties withdrew their appeals. The Decree followed in most respects the outline of Judge Skinner's Order, but with two crucial differences. First, though not formally involved in the litigation, the City had insisted upon – and received – removal of the provision requiring abolition of its homeowner exception to the fair housing ordinance.⁹⁷ In exchange, the plaintiffs were able to leverage some funding from HUD for additional units of affordable housing – both through new construction and mobility certificates.⁹⁸ With these changes, the parties agreed that the Consent Decree would replace the substantive portions of the original Order.⁹⁹ Filed concurrently with the Consent Decree, a

⁹⁷ See *infra* text at note 106.

⁹⁸ Another area in which the plaintiffs won additional funding was a dedication of funds from HUD for fair housing enforcement through private attorneys.

⁹⁹ The settlement also stipulated that it “shall contain the defendants’ sole obligation during the term of this Decree.”

Settlement Agreement between the City of Boston and HUD terminated a related lawsuit and directly bound Boston to comply with the terms of the Consent Decree.¹⁰⁰ In addition, the Decree retained the provision of the original Order mandating that HUD require compliance with the Decree as a condition of all contracts and grants with all local housing authorities throughout the metropolitan area.¹⁰¹

Organized substantively, the Consent Decree created the following obligations, discussed in greater detail in Part III:

(1) Fair Housing. The Decree required Boston and HUD to pass requisite legislation and take other actions to expand the fair housing enforcement powers of the Boston Fair Housing Commission (BFHC), and fund private attorneys to conduct fair housing litigation.

(2) Integration Through New Construction . HUD was obligated to fund and the BHA to construct 300 units of new subsidized housing supported by project-based Section 8 certificates.

(3) Integration Through Mobility Certificates. The Decree required HUD to fund and BHA to provide 200 tenant-based Section 8 mobility certificates.

(4) Integration Through Access to Subsidized Units. The BFHC was required to operate an affirmative marketing program and clearinghouse for vacant units in assisted housing (a program called “Metrolist”)

(5) Depletion of Affordable Housing. The Decree mandated that HUD not undertake any programs (such as its Demonstration-Disposition program) that would potentially decrease the number of affordable units in the metropolitan area unless specifically approved by the NAACP.

NAACP, Boston Chapter v. HUD Consent Decree, on file with author, at Preamble (hereinafter, “Consent Decree”).
¹⁰⁰ Enforcement of the Boston Settlement Agreement was left to HUD and City, respectively, to bring as a separate action in a court of competent jurisdiction. See Settlement Agreement for City of Boston v. Kemp at § 9 (hereinafter “Boston Settlement Agreement”). Furthermore, HUD agreed to limit its compliance review of Boston’s performance under the Decree to (1) “whether the program designs are appropriate, effective and consistent with the imposed conditions; and (2) whether the City has pursued good faith efforts in implementing the imposed conditions.” *Id.* at § 6. HUD also agreed to approve the City’s Fair Housing Plan of Dec. 31, 1990. See *id.* at § 7.

Just as with Judge Skinner's Order, though some reporting requirements were created,¹⁰² the parties established no specific enforcement scheme, relying instead on the retention of jurisdiction with the District Court. Even this oversight was limited, however, as the Decree prohibited the placement of additional funding obligations on HUD,¹⁰³ and limited the NAACP's authority to seek modification and enforcement of the Decree.¹⁰⁴

The terms of the Decree were compromises, results of an atmosphere of uncertainty, as "[b]oth sides had concerns about whether the [Court's 1989] order would stand up on appeal."¹⁰⁵ Nonetheless, as suggested above, the Decree was substantially shaped by Judge Skinner's original Order, deviating in only several significant respects. Judge Skinner's requirement that Boston eliminate the homeowner exception to the Fair Housing Act was discarded, while, in exchange, provision was made for HUD to fund the 500 units of additional housing, both through project-based certificates and mobility certificates. The plaintiffs also negotiated for additional funding for fair housing enforcement through private attorneys.

The Fair Housing Act extension that Judge Skinner had mandated may have provided the

¹⁰¹ See Consent Decree, *supra* note 99, at II.A.

¹⁰² Similarly to the original Order, HUD was required to submit to the court two types of reports to permit monitoring of its progress in implementing the Consent Decree. It agreed to submit semi-annual occupancy reports documenting the racial, family, and vacancy makeup of HUD assisted units as well as semi-annual implementation reports documenting its progressing in achieving the goals of the Consent Decree. See Consent Decree, *supra* note 99, at III.A – III.B.

¹⁰³ The Decree was subject to the explicit restriction that "no additional funding obligations not already explicitly contained in this Decree shall be imposed on HUD." Consent Decree, *supra* note 99, at IV.A.

¹⁰⁴ The NAACP agreed not to request modification until after (a) it had consulted with HUD seeking HUD consent to proposed modifications; and (b) "it appears ... that the Fair Housing Program, as designed, cannot achieve the purposes and goals set forth in Section II.B.2.d. within a reasonable time following the effective date of this Decree." *Id.* According to its Settlement Agreement, the City retained the authority to intervene in NAACP, Boston Chapter v. HUD to object to subsequent conditions imposed by HUD, proposed modification to Consent Decree, or proposed sanctions against City. See Boston Settlement Agreement, *supra* note 100, at § 2.

The NAACP was also barred from invoking its right to enforce the Consent Decree for the first 14 months of its effect and thereafter was only permitted to seek modification once per year. See *id.* The parties agreed to a predisposition in favor of terminating the Consent Decree; after five years from Decree's effective date (defined as "[t]he date the last appeal is dismissed," Consent Decree, *supra* note 99, at V), either party was entitled to request the court to review its progress and "unless plaintiff demonstrates that HUD has not performed its material obligations under this decree, the court will terminate this Decree." Consent Decree, *supra* note 99, at IV.B.

¹⁰⁵ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

NAACP with its most significant leverage in the negotiations. As one of the plaintiff's consultants noted, preserving the homeowner exception to Fair Housing Act "was something the City was very, very adamant about The City did not want to talk if that was not on the table."¹⁰⁶ Nonetheless, the NAACP's bargaining leverage was otherwise limited to the relief secured in Skinner's original Order and potential action of the First Circuit Court of Appeals that had demonstrated some solicitude for the plaintiffs in its previous two decisions.¹⁰⁷

In comparison to the relief provided in the similar *Gautreaux* case (eventually totaling some 7,100 mobility certificates), the NAACP seems to have received only limited funding concessions from HUD. The contrast, however, is not necessarily attributable to any legal obligations violated by the defendants or the strategies adopted by the parties. Instead, the general fiscal and political climate faced by the plaintiffs appears to have been among the key factors affecting this decreased level of relief afforded. First, the difference between the number of certificates made available in the *Boston Chapter, NAACP* case and *Gautreaux* was affected by the relative availability of federal funding between the two periods; when the NAACP was negotiating its Consent Decree with HUD, "the Section 8 program was beginning to dry up."¹⁰⁸ This likely forced the plaintiffs to settle for less than the approximately two or three thousand certificates contained in the NAACP's initial proposal.¹⁰⁹ Secondly, the political climate in Boston may simply have generated less pressure on local officials and HUD to increase remedial funds. In particular, Professor Clay notes, "[t]he Black political community in Chicago is very organized, very powerful – and, at the time of *Gautreaux*, it was even more so than now.... [The

¹⁰⁶ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹⁰⁷ See 607 F.2d 514 (1st Cir. 1979) (granting plaintiffs standing in reversal of District Court); 817 F.2d 149 (1st Cir. 1987) (holding that HUD could be held liable for violation of Title VIII, reversing District Court).

¹⁰⁸ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹⁰⁹ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

Black political community] was never so organized in Boston.”¹¹⁰ As one attorney for the NAACP recognized, in deploring the defendants’ subsequent performance, “It just goes to show that while litigation is an important component of a fair housing strategy, it can’t be the only component.”¹¹¹ If the size of the *Boston Chapter, NAACP* relief is dwarfed by the sheer number of units provided for in the *Gautreaux* order, however, the breadth of terms and obligations were far more comparable. In comparison to most such class action suits, the breadth of requirements imposed on HUD, the BHA, and private providers of assisted housing¹¹² was quite an impressive victory during the early 1990s.¹¹³

Another factor significantly affecting the negotiations was the presence of Raymond Flynn, then Mayor of Boston. Given the political context of the time, Flynn’s presence may have lead the plaintiffs to be less adversarial in their negotiating posture than they otherwise might have been.¹¹⁴ There was a sense that “Flynn wouldn’t do what [previous Mayor Kevin] White did [*i.e.*, resist racial integration],”¹¹⁵ combined with a hesitance on the part of the

¹¹⁰ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹¹¹ Natasha Lisman, quoted in Michael Rezendes, *Five Years Later, Antibias Landmark Largely Paper*, THE BOSTON GLOBE, Feb. 21, 1994, at 17 (adding that “civil rights activists say the disappointing results of the case underscore the limits of litigation in achieving civil rights gains, and point to the need for innovative planning and skilled administrators dedicated to carrying out civil rights initiatives.”).

¹¹² Having both HUD and Boston implicated in the remedy gave the NAACP access to a wide range of remedial options. While Boston and the BHA had not been joined as defendants, they were implicated in the relief obligations by way of the Boston Settlement Agreement with HUD. Joining additional parties in relief obligations has been urged by commentators as a way of securing greater resources for remedial programs. See Roisman & Tegeler, *supra* note 52, at 338 (urging advocates to “reach defendants capable of providing the additional resources - in land, units, and money - that are necessary”). Obviously, having HUD as a defendant expands the size and scope of available relief, particularly given the geographical breadth (metropolitan area relief) authorized in *Gautreaux*. See Roisman & Tegeler, *supra* note 52, at 338 (“HUD’s presence as a defendant expands the nature of programs available for relief.... Indeed, there is no reason that HUD’s ability to provide relief should be limited to particular programs.”). Cities and other state agencies may also bring additional resources to bear on relief programs. See Roisman & Tegeler, *supra* note 52, at 341 (also proposing inclusion of private parties where applicable).

¹¹³ One survey suggests that most class action housing discrimination cases had limited their remedial focus to tenant selection and assignment plans (TSAPs) in public housing programs. Julian and Daniel argued in 1989 that most remedies had not been as complete as might have been achieved; instead, “[r]emedies have focused almost solely on tenant selection and assignment procedures and transfers, usually voluntary.” Julian & Daniel, *supra* note 56, at 672.

¹¹⁴ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹¹⁵ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

NAACP to “go flat against the City because they were essentially having to go against their friends [in the Flynn Administration who insisted] that Flynn is committed to this and will try to make this work.”¹¹⁶ Thus, the plaintiffs “weren’t willing to ask a city agency to give up control of how [the certificates would be administered].”¹¹⁷ Perhaps it was this level of trust inspired by the new City personnel which lead to the parties to reach “an understanding ... that some terms were open and would be further negotiated.”¹¹⁸ Alternately, this openness may have been a consequence of the discretion left to the City in Judge Skinner’s original order and a consequent confidence on the part of the defendants that they could not be forced to make more specific commitments.

III. The Aftermath: Implementation of the Consent Decree

A. Enforcement Limitations on the Remedial Obligations

The fact that many elements of the settlement were not clearly operationalized - a fact which effectively vested implementation discretion with the defendants - combined with the absence of reliable enforcement mechanisms, left the NAACP without sufficient recourse when

¹¹⁶ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹¹⁷ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹¹⁸ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999. During the implementation of the Decree, changes at the federal level may have similarly induced some forbearance on the part of the NAACP. Most prominently, in the fall of 1992, frustrated by the inaction of the defendants, the NAACP filed a motion in U.S. District Court for new judicial orders, but “[t]he NAACP delayed its request after President Clinton was elected, hoping to reach an out-of-court understanding with newly named HUD officials.” Rezendes, *Five Years Later*, *supra* note 111, at 17. With the new administration, the plaintiffs felt they achieved successes more readily than they otherwise had. “Under the Clinton Administration with Cisneros and Cuomo, HUD has shown a willingness to resolve this that had not been present before,” noted an attorney for the plaintiffs. James B. McLindon, phone interview with the author, Tuesday, March 16, 1999. In particular, when Cisneros was Secretary of HUD, there was a “good feeling about fair housing at HUD” because of Cisneros’ “personal experience and concern with desegregation and integration.” Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. The former Secretary had listed “opening housing markets to all Americans” as one of five objectives of his administration. Michael Rezendes, *Sharing the Poverty: HUD’s New Approach to the Inner City*, THE BOSTON GLOBE, Apr. 3, 1994, at 57. In sum, the plaintiffs felt possibilities were open under his administration that had not been considered before. James B. McLindon, phone interview with the author, Tuesday, March 16, 1999; Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. Just as the political changes in Boston may have lead the plaintiffs to limit their demands for specificity in the original Consent Decree, the new administration at HUD may have made the plaintiffs more tolerant of delays in Consent Decree implementation - and made them resistant to press the Court for orders

confronted with later defects in the Decree's implementation. These faults, the combined result of the NAACP's limited political and legal leverage and the defects in Judge Skinner's original Order, have proven the most costly legacy of the Decree. One civil rights attorney in Boston notes that the primary problems with the Decree result from the fact that "the settlement was not defined operationally."¹¹⁹ In addition, those terms that are specified have proven nearly impossible to enforce because such "little court oversight was exercised" and "the resources needed to monitor implementation actively were not available to the parties"¹²⁰ Professor Clay agrees that the major defect in the Decree derived from the absence of enforcement, believing "that this is a missed opportunity, [though it is] not clear where leverage for more would have come from."¹²¹ Unless they wished to risk their gains in the First Circuit, the plaintiffs had to accept a Decree that, while promulgating a renewed commitment to fair housing enforcement and affirmative marketing efforts for housing integration, provided no ready mechanism for enforcement of the hard-fought rights.

The additional terms the NAACP was able to win in the Consent Decree – HUD funding for new affordable units and rent subsidies – would be plagued by the discretion the defendants retained in their implementation. Because of the terms' ambiguity, in fact, the parties remained in negotiations over substantial portions of the Decree as late as mid-1999. As one consultant for the NAACP noted, "[t]he problem since 1991 is that the argument is all about the details of implementation - except for the project-based certificates, which the City clearly opposed all along."¹²² Others have agreed; the Boston Globe reported that "the parties to the agreement

compelling compliance with the Decree.

¹¹⁹ Barbara Rabin, phone interview with the author, March 1, 1999.

¹²⁰ Barbara Rabin, phone interview with the author, March 1, 1999.

¹²¹ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999. Clay is skeptical, however, of how much even a judge eager to supervise implementation could accomplish; "[the plaintiffs were] looking to change a process, and judges may not have the power to do that." *Id.*

¹²² Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

cannot even agree about what they agreed on.”¹²³ The most divisive issue has been the question - not answered in the Decree itself - as to whether explicitly race-conscious policies are required in the use of both the tenant- and project-based certificates. The Boston Globe characterized “efforts to carry out the agreement [as] bogged down in bureaucratic delays and an aversion in the Reagan and Bush administrations to racially-based policies,”¹²⁴ contrasted with the NAACP’s insistence “that minorities should be the sole beneficiaries.”¹²⁵

Most of those who are or were involved with the plaintiffs therefore see “a sad message coming out of this case.”¹²⁶ State Senator Dianne Wilkerson, who after the 1989 court ruling had claimed that it would “change[] life for minorities in Boston in some very major ways,” noted in mid-1994 that the lawsuit had failed to produce any significant change.¹²⁷ The upshot has been that, in the word of one attorney for the NAACP, “[i]t remains difficult in 1999 for minority families to find integrated housing even after this decision.”¹²⁸

B. Term-by-Term Evaluation of the Decree’s Implementation

These general shortcomings of the Decree - the lack of enforcement mechanisms and the discretion vested in the defendants - affected each remedial provision in a different way. To understand the relative successes and failures of each provision requires a closer analysis of the limitations on the enforcement structure the Consent Decree provided for each obligation. In this section, I offer an analysis of the individual terms of the Consent Decree, suggesting the interests that motivated selection of obligation, reviewing the performance record of the defendants in implementing each provision, and suggesting what may have limited or promoted success in

¹²³ Michael Grunwald & Geeta Anand, *Boston Housing Dispute Drags On: Apartment Plans Go Unfulfilled*, THE BOSTON GLOBE, Mar. 11, 1996, at 1.

¹²⁴ Rezendes, *Five Years Later*, *supra* note 111, at 17.

¹²⁵ Grunwald & Anand, *supra* note 123, at 1.

¹²⁶ Barbara Rabin, phone interview with the author, March 1, 1999.

¹²⁷ Rezendes, *Five Years Later*, *supra* note 111, at 17.

¹²⁸ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

each case, as well as offering suggestions for future advocates in analogous cases.

1. Fair Housing Law Enforcement

Though the legislation needed to expand fair housing enforcement in Boston was significantly delayed, the pressures generated by the Consent Decree were ultimately successful. In addition to providing funding for independent fair housing legal representation, HUD made good on its commitments to withdraw funding from Boston for fair housing enforcements, affecting the political climate in which the city and state legislative bodies would work. Given existing political support for such legislation, the NAACP was able to ultimately stimulate compliance with this term of the Decree.

a. Plaintiff's Aspirations

Academic commentators and housing activists have long noted both the crucial role private activity plays in creating and maintaining segregated neighborhoods and the inadequacy of fair housing enforcement efforts to date. In light of the widespread evidence of discrimination in the residential housing market,¹²⁹ it is clear that, "[i]n most large American cities, discrimination in the housing market contributes to the segregation of minority households in inner-city neighborhoods.... High levels of race discrimination and segregation in American cities are at least partially attributable to a lack of enforcement of federal antidiscrimination laws."¹³⁰ Such limited enforcement efforts can be bolstered by remedies which both require the allocation of more resources to enforce fair housing laws and which place enforcement resources in the hands of independent fair housing advocates; furthermore, such efforts will dovetail with efforts to expand Section 8 mobility programs.¹³¹ Given a 1994 Report by the United States Commission on Civil Rights that criticized the government for "insufficient resources allocated

¹²⁹ See Massey & Denton, *supra* note 8, at 83-114.

¹³⁰ Schill & Wachter, *supra* note 2, at 1329-30.

to Fair Housing enforcement, substantial backlogs and lengthy delays in processing cases, and relatively few Secretary-initiated investigations of discriminatory practices,”¹³² one of the chief goals for advocates should continue to be securing greater resources for fair housing enforcement as well as independent administration of such programs.¹³³

Similar concerns prompted the plaintiffs to seek changes in fair housing enforcement in Boston. Structurally, the plaintiffs felt they needed to expand the enforcement powers of the Boston Fair Housing Commission (BFHC) because the Massachusetts Commission Against Discrimination (MCAD), the state agency responsible for enforcing anti-discrimination laws, “ha[d] a checkered history.”¹³⁴ “At that time, MCAD was viewed as operating incredibly slowly.”¹³⁵ The plaintiffs attributed part of MCAD’s limited effectiveness to inadequate funding relative to the enormous caseload it faced. In addition, during this period, the BFHC was considered unable to effectively combat discrimination because of its limited enforcement capabilities.¹³⁶ The litigation and Consent Decree presented an opportunity to win more

¹³¹ See, e.g., Julian & Daniel, *supra* note 56, at 675.

¹³² Schill & Wachter, *supra* note 2, at 1332, citing U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* 196 (1994).

¹³³ Nonetheless, there are reasons to believe that fair housing enforcement activities will not by themselves benefit those most harmed by systematic segregation. As Professor Roisman has noted, “Fair housing enforcement alone is not a tool for deconcentrating poverty. Most fair housing enforcement is driven by individual complaints, and a disproportionate amount of the enforcement activity is on behalf of persons with disabilities and families with children rather than on behalf of racial and ethnic minorities. Even when the complaints are of racial or ethnic discrimination, they are unlikely to come from very poor people. Relatively few poor people of color have the time, confidence, and psychic energy to pursue fair housing complaints.” Roisman, *Response*, *supra* note 8, at 1373.

Roisman has also questioned the effectiveness of fair lending efforts as a method of alleviating the segregation of urban minority poor, writing that “Fair lending is of questionable utility for deconcentrating poverty.... Fair lending for single-family homeownership is a program directed at moderate- or middle-income blacks, not at very poor people: very poor people cannot afford homeownership in cities. If ‘fair lending’ increases black homeownership in minority neighborhoods, it exacerbates racial concentration. If it enables blacks to move to white neighborhoods, it exacerbates poverty concentration by leaving poor blacks behind.” Roisman, *Response*, *supra* note 8, at 1373. Furthermore, some studies have shown an unintended consequence of lending regulations aimed at requiring banks to target loans at poor and minority areas. “Instead of being less likely to be rejected when they apply for loans in nonpoor neighborhoods, low-income applicants face a higher probability of rejection [than when they seek loans in poor neighborhoods].” Schill & Wachter, *supra* note 2, at 1327.

¹³⁴ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

¹³⁵ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

¹³⁶ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

resources for the enforcement of fair housing laws and improve the enforcement capabilities of existing agencies. In addition to the Fair Housing Commission changes, the plaintiffs also sought additional funding for independent fair housing legal assistance. Both provisions were seen as mechanisms to decrease the incidence of residential housing discrimination. Combined with wide political support for anti-discrimination law, this program was among those which the NAACP thought it would be better poised to pursue.

b. Consent Decree Terms

The NAACP proved successful in incorporating these aspirations into the Consent Decree, in large part because Judge Skinner had placed similar provisions in his original Order. As provided in the Decree, as a condition of future grant receipts, Boston would be obligated to extend the powers of its Fair Housing Commission (BFHC), creating a Fair Housing Law Enforcement Program with the power to “[h]ear and investigate complaints of discriminatory practices,” bring administrative and judicial proceedings within the City’s legal authority, refer cases beyond its authority to other agencies, and assist discrimination victims by providing information and referrals to legal service organizations.¹³⁷ BFHC would engage in good-faith lobbying on behalf of the City to have the State legislature enact legislation granting expanded enforcement powers to BFHC, “including ... the power to levy fines and institute civil actions.”¹³⁸ The City agreed to continue seeking passage of such legislation until successful and to renew its efforts should any portion of the legislation be struck down by a court.¹³⁹ HUD was also committed to support such legislation.¹⁴⁰ Furthermore, in addition to the enabling legislation

¹³⁷ Consent Decree, *supra* note 99, at II.B.2.b.

¹³⁸ *Id.* at II.B.2.c. The powers the Consent Decree required the Boston Fair Housing Commission to seek were to match, at a minimum, those of the Home Rule Petition pending before the Massachusetts General Court as H.6239 of 1990. *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See* Consent Decree, *supra* note 99, at II.D.4. In the event that the necessary legislation was not passed by July 1991, the Consent Decree required HUD to “seek the consent of [the state anti-discrimination agency] ... so that

at both the state and local levels, Boston was committed to seek HUD certification of the expanded Fair Housing Commission.¹⁴¹ The City agreed to continue to seek legislative passage of such an act until such “substantial equivalency” certification was approved.¹⁴² The City also agreed to seek funding for the BFHC to further the purposes of the Consent Decree.¹⁴³ Related to the expansion of its enforcement authority, the Fair Housing Commission would operate a Fair Housing Public Education Program to inform the public of rights under existing law and programs offered by Fair Housing Commission.¹⁴⁴

The NAACP was also able to secure funding for independent fair housing enforcement efforts. In a provision added to the original requirements of Judge Skinner’s Order, HUD agreed to provide a total of \$700,000 over 4 fiscal years (FY 91 - FY 94) “to subsidize the unreimbursed legal assistance costs incurred by private attorneys pursuing judicial or administrative relief for fair housing violations.”¹⁴⁵ HUD and NAACP were to agree to the general identity of such provider.

c. Enforcement History

These two prongs of the Consent Decree’s fair housing enforcement regime met with different fates, however. HUD readily met its obligation to fund independent attorneys to provide fair housing assistance – and even exceeded the Consent Decree by extending such

HUD may conduct Title VIII investigations and enforcement proceedings ... pending passage of [legislation granting necessary powers to the Boston Fair Housing Commission].” See Consent Decree, *supra* note 99, at II.D.3.

¹⁴¹ In its associated Settlement Agreement with HUD, Boston “agree[d] to seek the certification of the Boston Fair Housing Commission as a ‘substantially equivalent’ agency, pursuant to Section 810 (f) of the Civil Rights Act of 1968, as amended, 42 U.S.C. § 3610 (f), for the purpose of conducting Title VIII investigations and enforcement proceedings within three (3) months of the enactment of [the Home Rule Petition].” Boston Settlement Agreement, *supra* note 100, at § 5.A.

¹⁴² See *id.*

¹⁴³ See Boston Settlement Agreement, *supra* note 100, at § 5.B.

¹⁴⁴ See Consent Decree, *supra* note 99, at II.B.2.e. This provision had also been included in the original Order. See NAACP, Boston Chapter v. Kemp, 721 F.Supp. 361, 372 (D. Mass. 1989).

¹⁴⁵ See Consent Decree, *supra* note 99, at II.D.1.

funding an additional three years.¹⁴⁶ The group selected to receive the grant, the Lawyers' Committee for Civil Rights, also won a \$1 million grant from HUD to produce a series of anti-discrimination public service announcements which would also publicize the availability of legal services through the Lawyers' Committee.¹⁴⁷ By contrast, the provision requiring the passage of home rule legislation empowering Boston to strengthen the Fair Housing Commission and subsequent action by the Boston City Council met with initial resistance, however -- though, as of this writing, it has achieved some ultimate -- if long-awaited -- success.

This divergence is directly attributable to the relative level of discretion given the defendants in affirmatively implementing the two provisions. The attorney funding obligation required little active participation from HUD and was easy to monitor, even by the court. By contrast, the Fair Housing Commission provision required action from the legislature, left to it substantial discretion in formulating its terms, and provided for enforcement only through HUD's threat of withdrawal of funds; this allowed for a substantial scope of contestation over the terms of remedial legislation, ultimately delaying satisfaction of the Decree requirements.

Interestingly, this legislative requirement did not pose the conventional efficacy and legitimacy concerns that would normally be implicated by a court-ordered legislative scheme.¹⁴⁸ In this case, the court's Order was not directed at the legislature, but instead required HUD to condition continued funding on the passage of such legislation. The *court* was not requiring legislative action; instead, *HUD* was to require a choice from Boston and Massachusetts: remain

¹⁴⁶ The NAACP and HUD reached agreement on the provider -- the Boston Lawyers' Committee for Civil Rights -- relatively quickly. The parties later reached a side agreement granting the Lawyers' Committee additional funding over three additional fiscal years, extending its jurisdiction in these cases to the Boston metropolitan area, preventing "recapture" of previously allocated funds, easing requirements for reimbursement of costs, and eliminating a competitive bid procedure that could otherwise have been imposed on the Lawyers' Committee to receive the additional funding. See Lawyers' Committee Side Agreement, on file with author.

¹⁴⁷ See *HUD Money to Fund Housing Rights Ads*, THE BOSTON GLOBE, Dec. 16, 1994, at 84.

¹⁴⁸ For criticisms of the efficacy and legitimacy of court-mandated legislative action, see Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (1983).

inactive and lose funding, or pass the required enabling laws. Since little program implementation discretion was left to it, HUD did adequately fulfill its commitment to press for the requisite legislation from both Boston and the state legislature. In fact, its threat of withdrawing federal funds for fair housing enforcement, though not a perfect enforcement device, demonstrated some reasonable success in keeping the issue on the legislative agenda and stirring the State Senate to action.

After approval of the Consent Decree in March 1991, there was a lack of support for such legislation. "Both the state and the City Council didn't want to do this [pass the required Fair Housing Commission legislation]; they didn't feel that they were a party to the lawsuit."¹⁴⁹ Given that the "minority community in Boston [was] not well-organized" (and historically has not been so), the political support to expedite passage of the needed legislation was absent.¹⁵⁰

In 1991, one of the first efforts to pass a home rule petition giving the Fair Housing Commission additional enforcement powers, including the ability to levy fines, was derailed by eleventh hour politics that were alternately characterized as an effort to strengthen the fair housing bill or to embarrass the Mayor.¹⁵¹ Despite these political wranglings at the local level,

¹⁴⁹ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

¹⁵⁰ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

¹⁵¹ State Senator Bill Owens (D-Mattapan), "the city's senior black elected official and a bitter foe of Mayor Flynn," was the central figure in preventing passage of the legislation. Michael Rezendes, *Owens Stalls Bill on Bias in Housing*, THE BOSTON GLOBE, Dec. 11, 1991, at 41. Owens argued that "the proposed legislation is [not] as strong a piece of legislation as it should be." *Id.* In particular, Owens bemoaned the homeowner exemption and insisted that money from discrimination fines be reserved for housing-related activities rather than going into the city's general treasury. *See id.*; Michael Rezendes and Steve Marantz, *Petition's Failure Blamed on Owens: Officials: City Could Lose Housing Funds*, THE BOSTON GLOBE, Jan. 2, 1992, at 21. Nonetheless, Owens' objections suggested the extent to which legislative action required by a Consent Decree can become entangled with a range of political issues. In particular, there were suspicions that "Owens ... waited until the 11th hour to raise questions about the bill, [and] that his central purpose may be to embarrass [Mayor Flynn]." Rezendes, *Owens Stalls*, *supra* note 151, at 41. Moreover, the legislation had troubled other black legislators throughout the course of its consideration, primarily because of the homeowner exception; the original home rule petition approved by Boston's City Council in 1990 prevailed after "rancorous debate along racial lines," *id.*, with black members and liberals opposing the bill. Even Dianne Wilkerson, then an attorney for the NAACP (and, since 1992, a State Senator) had originally opposed the bill until it became part of the Consent Decree. *See id.* Ultimately, to the dismay of local civil rights leaders and city officials, Owens did succeed in blocking the home rule petition by amending it on the last day of the session (December 30, 1991) giving lawmakers no opportunity to deliberate on the amended bill. Rezendes & Marantz,

HUD appeared to fulfill its obligations to urge passage of the new law, pressing the State Senate through public statements and private lobbying to pass the legislation, noting that “failure to act on the home-rule petition before the end of the state legislative session could jeopardize hundreds of thousands of dollars in federal funds awarded to the [Fair Housing Commission].”¹⁵² Despite the defeat, the Decree had forced the issue onto the political agenda, where it would remain and gain strength over the ensuing legislative sessions.

When similar legislative difficulties prevented the State Senate from approving a new Boston home rule petition in 1992,¹⁵³ HUD did act, stripping the Fair Housing Commission of its enforcement authority and withdrawing federal funding for the program from Boston; instead, housing discrimination cases would be transferred to the state fair housing commission (MCAD). The publicity generated by the transfer maintained pressure on the city and state to continue their efforts to adequately address the fair housing question.

Though the bill was defeated a third time in January 1994,¹⁵⁴ the City Council’s resolve to address the issue was steeled and, in March 1994, it again approved a home rule petition to expand the Commission’s enforcement powers. With Mayor Menino forcefully supporting the

supra note 151, at 21.

¹⁵² Michael Rezendes, *Owens Stalls Bill on Bias in Housing*, THE BOSTON GLOBE, Dec. 11, 1991, at 41.

¹⁵³ In mid-1992, the City Council again approved a home rule petition to strengthen the Fair Housing Commission’s enforcement powers, but Senator Owens pledged to oppose it. *See* Rezendes & Marantz, *supra* note 151, at 21; Michael Rezendes, *Sen. Owens Balks on Fair Housing Plan*, THE BOSTON GLOBE, May 27, 1992, at 22. Owens filed legislation in June 1992 to overhaul the Commission in a move seen by many city officials and civil rights activists as “a political ploy to undercut Mayor Flynn’s authority over fair housing laws” that threatened to create “a legislative logjam” which could prompt HUD to deprive the Commission of even its limited funding and enforcement powers as required by the Consent Decree. Michael Rezendes, *Owens Draws Fire Over Fair Housing Accord*, THE BOSTON GLOBE, June 5, 1992, at 58; Michael Rezendes, *Housing Board Overhaul Proposed*, THE BOSTON GLOBE, June 4, 1992, at 48.

¹⁵⁴ Even after State Senator Owens was replaced by the 1992 election of Dianne Wilkerson, the enabling legislation still faced difficulties. The bill was defeated again in January 1994 by the State Senate, despite HUD efforts to support it, and Senator Wilkerson accused State Senate President William M. Bulger (from predominantly white South Boston) and other Senators (including Marian Walsh of West Roxbury and Paul White of Dorchester) of orchestrating the bill’s defeat. *See* Rezendes, *Five Years Later*, *supra* note 111, at 17; Chris Black, *Wilkerson Says Hub Lawmakers Worked to Kill Fair Housing Bill*, THE BOSTON GLOBE, Jan. 5, 1994, at 21 (Wilkerson’s criticism echoed by Victoria Williams, director of the Fair Housing Commission). Those legislators proposed a substantially weakened form of the bill (halving available discrimination fines and requiring court action to impose them),

law,¹⁵⁵ not least because of the sizeable resources the city stood to gain control over, the legislation fared better. In May 1994, a bill granting a range of expanded powers was finally passed by the both houses of the legislature. The bill extended to the Commission the power (1) to seek preliminary injunctions against landlords to freeze units that are the subject of dispute; (2) to hold its own hearings to assess discrimination claims; (3) to award damages, including emotional distress; and (4) to assess civil penalties up to \$10,000 for a first violation and \$50,000 for multiple violations.¹⁵⁶ Boston subsequently passed the ordinances which expanded the Boston Fair Housing Commission's enforcement powers in 1995, despite some opposition from members of the City Council.¹⁵⁷ Nonetheless, some work remains; even with the required legislation, however, the Commission has yet to achieve certification of "substantially equivalent" status because such a designation requires a series of bureaucratic interactions between HUD and the City.¹⁵⁸

Much of the success of the fair housing legislation can be attributed to Mayor Menino's efforts, due in part to the self-interest of gaining federal funding for an expanded city agency.¹⁵⁹ In addition, previous legislative efforts may have built a rising consensus around the need to eliminate the embarrassing limitations on the city's fair housing enforcement program. But the

eroding support from legislators who were willing only to support a strong version. *See id.*

¹⁵⁵ See Chris Black, *Senate's Changes to Home Rule Bills are Riling Boston*, THE BOSTON GLOBE, Mar. 21, 1994, at 14.

¹⁵⁶ See Doris Sue Wong, *House OK's Expansion of Powers for Boston Fair Housing Board*, THE BOSTON GLOBE, May 24, 1994, at 20.

¹⁵⁷ The opposition was led by City Council President, Jim Kelley, formerly the councilor from predominantly white South Boston. Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

¹⁵⁸ After the City promulgates its implementing regulations for the Fair Housing Commission, it sends them to HUD for approval of the Commission as a "substantially equivalent" agency. Typically, a year later, HUD responds with comments on the proposal, and the City must generate a new draft. It currently appears that HUD should have few more comments and will then approve the Commission as a "substantially equivalent" agency. James B. McLindon, phone interview with the author, Tuesday, March 16, 1999 ("It takes HUD about a year to do anything and the city a year to respond."). NAACP consultant Lisa Sloane confirms that the process requires a substantial amount of bureaucratic dialogue prior to approval. Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

economic and political pressure created by HUD's withdrawal of funding and enforcement authority seems to have successfully kept the issue on the agenda and won greater support for the remedial action over time. Though the action may depend to some degree upon political shifts, the presence of a Consent Decree and the incentives it creates, when arranged properly, seems capable of forcing an issue and stimulating the required response.

Future advocates may seek to emulate the structures used here and incorporate into future remedies provisions which offer financial incentives for legislative compliance. The opportunity for additional funding (or threat of its loss) thus gives legislators the opportunity to develop some political support for passing remedial laws. Nonetheless, the benefits of such frameworks is limited; this history suggests that even where a Consent Decree enlists the support of a federal agency with the discretion to terminate funds, legislative action may be slow in coming.

Some may reason that whether the alternate legislation was merely a pretextual ploy to derail Fair Housing Commission enhancement or if it reflected honest policy disagreements, this history demonstrates that the vagaries of the legislative process are ill-suited to producing rapid compliance with the terms of court orders or federal mandates. This criticism can be taken too far, however, given that, although fulfillment of this provision has been delayed, the City and HUD have now substantially complied with their obligations under this requirement - in marked contrast to other Consent Decree provisions, discussed below, which did not require legislative action. This contrast suggests that the relative speed with which the legislature met this Consent Decree provision is not a result of any inherent difference in the responsiveness to mandates by legislatures or city agencies. Instead, the degree of legislative resistance may depend not on the "inherent" procedural limitations of a particular government body, but rather on the relative political popularity of what it is called on to do. In this case, given that fair housing enforcement

¹⁵⁹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

is popular in theory among all constituencies, even if enforcement often produces limited results, the legislature risked little in ultimately approving enhancement of the Commission's powers. By contrast, as will be explored below, where Consent Decree provisions required constructive local agency action, executive resistance was more pronounced.

2. Integrating Through New Construction: Project-Based Certificates

The defendants made the least progress on the Consent Decree provision requiring the siting and construction of 300 units of additional affordable multifamily housing to be funded by HUD with project-based Section 8 certificates. Sadly, Boston's experience in this regard is not unusual; PHAs and other defendants often successfully resist implementation of terms which require new construction or other initiative on their part. Despite the unequivocal goal of 300 units enumerated in the Consent Decree, the lack of progress resulted from the Decree failure to create a procedural framework capable of circumventing the problems that have historically plagued construction of new assisted housing.

a. Plaintiff's Aspirations

The plaintiffs sought a commitment to construct of these new affordable units for a number of reasons, but primarily because the NAACP preferred the "inherently integrated" dimension of housing set up in predominantly white neighborhoods.¹⁶⁰ The units held virtues that tenant-based certificates did not. As plaintiff's attorney Jim McLindon noted:

Mobile certificates are difficult because even if you give housing counseling and support, they are difficult for people to place, especially in a tight housing market [as Boston has experienced much of the 1990s]; it's just hard for people to get housing in any neighborhood. But if the housing is project-based and set-aside for minority families, you would be guaranteed a substantial success from the beginning if you can get the siting arranged.¹⁶¹

Academic commentators have found additional benefits in project-based certificates. As

¹⁶⁰ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

Professor Roisman notes:

'Hard' units have the virtue of long-term availability; certificates and vouchers are short-lived. 'Hard' units are also more likely to include three-, four-, and five-bedroom units needed by large, low-income families. 'Hard' units add to the stock of community-owned housing, while certificates and vouchers merely help pay rent. Certificates and vouchers, on the other hand, have the virtues of allowing choice and dispersal; they can enable racial and economic integration in jurisdictions in which PHAs might not be able to build units.¹⁶²

Perhaps the most compelling reason for including such units in a Consent Decree is that it combines the plaintiffs' desegregation goals with their desire to increase affordable housing resources available to poor families. This development of additional affordable units is crucial because "[v]igorous enforcement of antidiscrimination laws will do little to deconcentrate the inner-city poor if a sufficient supply of affordable housing does not exist outside of the inner city."¹⁶³

b. Consent Decree Terms

The Consent Decree built on the term in Judge Skinner's original order requiring merely that HUD make "best efforts" to encourage that all available resources allocated to the City are "used to increase the supply of affordable integrated family housing in the City, whether public, public assisted, or private."¹⁶⁴ In particular, it leveraged a funding commitment from HUD for new affordable units; HUD agreed to subsidize 500 units of Section 8 family housing, having an average of 3 bedrooms, for a maximum of 15 years.¹⁶⁵ Of these 500 units, 300 were to be 5-year renewable project-based Section 8 subsidies, "to be located in the City of Boston and sited

¹⁶¹ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

¹⁶² Roisman, *Response*, *supra* note 8, at 1370. Other commentators have expressed enthusiasm for "hard," scattered-site housing. See, e.g., David Blair-Loy, *A Time to Pull Down, and a Time to Build Up: The Constitutionality of Rebuilding Illegally Segregated Public Housing*, 88 NW. U. L. REV. 1537, 1576-77 (1994) ("when additional funding for new construction becomes available, scattered site construction offers a prime vehicle to achieve public housing desegregation").

¹⁶³ Schill & Wachter, *supra* note 2, at 1333.

¹⁶⁴ See Consent Decree, *supra* note 99, at II.C.1.

¹⁶⁵ See *id.* at II.C.2.

pursuant to 24 C.F.R. Part 882, Subpart G,” while 200 such units were to be portable Section 8 Existing Housing Certificates.¹⁶⁶ Furthermore, the agreement provided that the funding for these units was to be in addition to what Boston area PHAs would receive in a fair share allocation;¹⁶⁷ HUD could not use frustrate the purpose of the Decree by reducing the funding Boston would otherwise receive.

c. Enforcement History

Despite the plaintiffs’ high aspirations for these new units, the defendants have yet to site or construct any developments under this provision of the Consent Decree. Though the defendants point to disputes with the plaintiffs over open terms in the Consent Decree as the leading factor in the delay, the resistance is more likely due to feared neighborhood resistance. Without an enforcement scheme that requires specific procedural steps from the local public housing authority or that incentivizes its participation in site selection, the Decree is ill-suited to overcome the political forces operating against subsidized housing development.

Part of the problem lies in the absence of any terms in the Consent Decree specifying tenant composition for these new units, an omission which effectively reserved discretion to the defendants. In 1994, the Boston Globe reported that, despite the guarantee of federal funding for these 300 units, the subsidies have gone unused because HUD and the NAACP were unable to agree on a plan for locating the apartments or selecting tenants.¹⁶⁸ Some of the NAACP’s dispute with HUD governed the composition of the tenancy for these units; the NAACP argued that only minorities should be eligible to live in the 300 units because minorities were the plaintiff class, but HUD noted that there was no specific language in the agreement requiring

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ Rezendes, *Five Years Later*, *supra* note 111, at 17.

reservation of all subsidized units for minorities.¹⁶⁹ Although minority families would disproportionately benefit tenants were chosen from pre-existing waiting lists (because minorities make up at least two-thirds of the current waiting lists for assisted housing), the plaintiffs believed it was necessary to require that the housing be preserved exclusively for minority families. In particular, they “felt that one-third of the units [the likely number that would be received by whites if units were distributed through pre-existing public housing waiting lists] was a lot to give up in such a limited remedy.”¹⁷⁰ In agreeing to the Decree without a clear articulation of the requirements for tenant composition, the plaintiffs vested discretion with the defendants and severely handicapped their prospects for successfully enforcing their interpretation on the BHA and HUD. Most importantly, the NAACP undercut any public relations leverage it might otherwise have had by giving the BHA a reason – even if only a pretextual one – to evade constructing the new units.

As the plaintiffs see the dispute, however, that ambiguity may be irrelevant because the real source of resistance has been Boston’s aversion to the program. The City was “never willing to do the project-based certificates,”¹⁷¹ and the BHA “never said they wanted to do it.”¹⁷²

The history of project-based certificate construction confirms the plaintiffs’ suspicions that the composition issue is a red herring. In those programs where there is no dispute as to tenant composition, the NAACP’s experience of local opposition is, unfortunately, far from unusual. For a specific example, one need look no further than the leading case on such housing discrimination remedies; the obstacles to producing housing in integrated communities were clearly suggested by the aftermath of the *Gautreaux* settlement. Though now seen as a model for

¹⁶⁹ *Id.*

¹⁷⁰ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

¹⁷¹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

¹⁷² Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

mobility certificate programs, the original *Gautreaux* order focused on scattered-site housing:

Scattered site construction was the cornerstone of the original remedial order in the *Gautreaux* case In *Gautreaux*, the court divided Chicago into areas of high and low minority concentration. The court then ordered that for every unit of public housing provided in an area of high minority concentration, CHA [the Chicago Housing Authority] had to provide three in an area of low minority concentration.¹⁷³

However, the plaintiffs in *Gautreaux*, as in Boston, found that resistance to the construction of such units stifled the intended remedy. Chicago, for example, raised a host of procedural excuses to stall such construction and obscure its political resistance – or at least absence of political will – to build the required units:

In Chicago, ‘implementation of the ‘scattered site’ program was virtually non-existent for ... five years’ after the court’s initial remedial order, and then ‘the program proceeded at an extraordinarily slow pace.’ In the years immediately after the remedial order, CHA failed to comply with the court’s order to submit sites for scattered site public housing. Then, the Chicago City Council refused to approve sites located in nonminority areas. In response, the court enjoined the operation of the Illinois law that required council approval of CHA sites. Subsequently, CHA failed to use ‘all practicable steps’ to implement an aggressive acquisition program, and the scattered site program languished. Finally, the court appointed a receiver [in 1987] to administer the scattered site construction program for the CHA. Since the appointment of a receiver, the pace of the scattered site program has accelerated somewhat.¹⁷⁴

The resistance to constructing integrated units – and the multiple points available for derailing the city planning process – present such tremendous barriers to constructing even scattered-site integrated housing that a municipality is likely to forgo any affordable housing construction rather than proceed under a plan requiring integrated construction; in *Gautreaux*, for example, “[t]he primary impact of this decision was the sharp curtailment of new public housing.”¹⁷⁵

Gautreaux’s aftermath certainly seems to suggest that certificate programs, relying less

¹⁷³ Blair-Loy, *supra* note 162, at 1574-75.

¹⁷⁴ *Id.* at 1575-76.

¹⁷⁵ Goldstein & Yancey, *Public Housing Projects, Blacks, and Public Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY 262, 265 (Goering, ed. 1986).

on the affirmative planning of a city agency and lacking the geographical specificity around which local resistance may coalesce, are far more likely to simply *be administered* – regardless of whether they are more or less effective in achieving “integration.” As Professors Roisman and Tegeler concluded, “[w]hen the plaintiffs’ focus shifted from building new units to subsidizing low-income minority families in existing units, more housing was secured for those families.”¹⁷⁶

Nor was *Gautreaux* the exception. As the history of similar orders governing local PHAs suggests, the construction of additional affordable units in predominantly white areas poses significant structural challenges when local government agencies are central to implementation:

[D]espite its merits in expanding the overall supply of low-income housing, new construction may be the least effective approach to achieving significant housing desegregation. New construction is too slow, too dependent on suburban government cooperation and, although it can generate landmark lawsuits, new construction is unlikely to produce a sufficient number of units for desegregation purposes.¹⁷⁷

Wherever the units are to be constructed, local government involvement will often be necessary because of restrictive zoning laws,¹⁷⁸ which require the involvement of politically-charged zoning boards, a forum in which local opposition to low-income housing may coalesce. Furthermore, given difficulties associated with any property acquisition, “it may prove difficult for a housing authority to acquire enough suitable sites for scattered site construction.”¹⁷⁹ The former problem can be abated to the extent PHAs use strategies built around the “acquisition and rehabilitation of existing housing in suburban communities, which generally require no zoning or

¹⁷⁶ Roisman & Tegeler, *supra* note 52, at 314 n.8. *See also id.* at 329 (Though “the relief imposed by the court addressed the City’s site selection processes, ... decades of litigation and political action produced relatively few scattered site units. By contrast, when plaintiffs later focused on enabling public housing residents to move with subsidies into units already existing in predominantly white communities, they were quite successful.”).

¹⁷⁷ Tegeler, *supra* note 26, at 232-33.

¹⁷⁸ *See* Tegeler, *supra* note 26, at 233.

¹⁷⁹ Blair-Loy, *supra* note 162, at 1576.

other land use permits.”¹⁸⁰ The latter may be addressed if, in addition to project-based Section 8 subsidies, plaintiffs seek federal funding for incentives to reward states and localities that reduce such barriers to local development as zoning ordinances, impact fees, and growth controls.¹⁸¹ Deeper subsidies could also be required from HUD to increase developer interest in undertaking such projects. “Additional funding sources are generally necessary to make project-based certificate developments work,” notes NAACP consultant Lisa Sloane.¹⁸² “To make the units affordable, you need to have other pieces of the deal subsidized”¹⁸³ - for example, the donation or sale of inexpensive land owned by the city or acquired by eminent domain.

Most significantly, progress in the construction of scattered-site units will often depend on the interest and expedience of the local public housing authority, which may have little incentive to forward a desegregative program opposed by local constituencies. As one commentator has noted, “a scattered site program depends on the active and competent cooperation of the housing authority charged with implementing it - the same agency that unconstitutionally discriminated in the first place. This obstacle may be partially overcome by the appointment of a receiver, as in Chicago, but courts are reluctant to take such a radical step.”¹⁸⁴ Alternatively, plaintiffs could urge a court to authorize a nonprofit developer (or several developers) to proceed with project siting and construction; though this would likely

¹⁸⁰ Tegeler, *supra* note 26, at 233.

¹⁸¹ See Schill & Wachter, *supra* note 2, at 1333.

¹⁸² Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

¹⁸³ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. Professor Roisman agrees that shallow subsidies, such as those provided through either the project-based or tenant-based Section 8 programs, may be insufficient to enable desegregative moves for very poor minority households; “to achieve deconcentration, affordable housing construction must be linked to both deeper subsidies and desegregative action. The provision of a deep subsidy is crucial to enable very poor people of color to move to nonpoor areas.” Roisman, *Response*, *supra* note 8, at 1374. She argues that subsidy programs can be combined to have greater impact, for instance by linking shallow-subsidy units in higher-income white areas with demand-side subsidies such as certificates and vouchers. However, “[e]xperience shows ... that that linkage is unlikely to be made unless it is required by law. The shallow-subsidy developments that now exist in white areas have not achieved racial desegregation, despite civil rights laws, including HUD’s Affirmative Fair Housing Marketing Regulations.” *Id.*

¹⁸⁴ Blair-Loy, *supra* note 162, at 1576.

engender similar resistance as a receivership plan. Others have argued that delegation of power to nonprofits to implement remedial programs avoids involving judges in those remedial decisions they are least suited to undertake.¹⁸⁵

Learning from this history of structural obstacles to effective decree implementation, there are a number of ways the Consent Decree could have been tailored to mitigate the effects of defendant recalcitrance. The plaintiffs in the *Boston Chapter, NAACP* case might have attempted to expedite performance by establishing an enforceable procedural framework which would impose specific deadlines on the BHA regarding implementation of the project-based certificate developments. Greater specification of their obligations, both procedural or substantive, was successfully resisted by the HUD and the BHA in this case. Given the hands-off attitude taken by Judge Skinner in this case, it seems unlikely the NAACP could have won such a framework from the District Court after appeal. With Judge Skinner's unwillingness to appoint a Special Master or to create a viable enforcement mechanism for the Decree, there would appear to be little incentive for the defendants to agree to any substantive controls on their discretion.

In addition to procedural specifications, other plaintiffs faced with more hospitable district court judges might seek to enumerate viable sites for scattered-site development by drawing on the expertise of local non-profits. Though it is almost certain that defendants would vehemently resist imposition of any specific site requirements, the presentation of such concrete options for remedy might both make the court more willing to move in enforcing development requirements against the defendants and simultaneously relieve the local agency from pressure by any organized neighborhood resistance (*i.e.*, make the BHA able to blame the court for requiring the development). To the extent a Decree gives discretion to the BHA to choose

¹⁸⁵ See generally Levit, *supra* note 1.

project sites in spite of (feared) neighborhood resistance, the Consent Decree seems to have generated incentives for the BHA to resist construction at all.

This latter consideration – providing incentives for local agency action – could also be employed proactively, as it was in HUD’s conditioning of funding on fair housing enactments. A consent decree could be structured to promote BHA involvement in construction by establishing deadlines for the development process past which HUD would be obligated to withhold other sources of funds from the city. In addition to (or instead of) such sticks, carrots – additional funding for scattered-site development – could be required from HUD for development within a specified time-table. As the experience with these types of orders suggests, even an indulgent timetable (by plaintiffs’ lights) might very well produce results more quickly than would be achieved with open-ended mandates.

3. Integration through Mobility Certificates: Tenant-Based Section 8s

Though mobility remedies can be among the most effective methods of achieving integration, the Consent Decree in this case did not establish any enforcement mechanism for constraining the locality’s discretion in implementing this program. Without any incentives to make integrative placements or restrictions on program implementation and no HUD threat of withdrawing funds, the BHA had no reason to treat the remedial certificates any differently than conventional Section 8s. Nonetheless, ongoing struggles with the NAACP over the implementation of this program shifted the political climate and made the BHA more open to new integrative programs.

a. Plaintiff’s Aspirations

The use of mobility certificates has long been a goal of advocates for integration, not least because “[t]here is significant demand for housing mobility among families that have been

surveyed, and in many metropolitan areas, there appear to be substantial numbers of affordable units that are at or close to Section 8 [FMR] levels.”¹⁸⁶ Furthermore, reviews of other mobility programs have found that “in metropolitan areas where regional mobility programs have been implemented – particularly programs that provide assistance to recipients in finding suburban housing units – there has been significant movement of families from high-poverty neighborhoods to lower-poverty neighborhoods.”¹⁸⁷

Mobility programs have certain advantages compared to project-based funding programs. First, Section 8 certificates are not viewed as being directly coercive of municipalities. Instead, the government provides assistance to private owners who choose to participate in the program. Further, the structure of the program harmonizes with the current government trend away from direct involvement in subsidized housing. More importantly, though, the project-based certificates generate greater resistance because they often support new unit construction and thus involve the locality more directly in politically-fraught intricacies such as siting and zoning.¹⁸⁸ Thus, one set of commentators concludes, “tenant-based certificate programs like Section 8 represent the strongest potential for racial and economic integration in the short term, particularly in comparison with the slow process of building new low-income housing units in the suburbs.”¹⁸⁹ The significant drawbacks of mobility certificates include the fact that they do not

¹⁸⁶ Tegeler, Hanley & Liben, *supra* note 7, at 457. *But see* Adams, *supra* note 12, at 452 n.162 (arguing that program participants are generally not motivated by integrative purposes).

¹⁸⁷ Tegeler, Hanley & Liben, *supra* note 7, at 457-58. Though some critics have claimed mixed results characterize mobility programs, *see, e.g.*, Adams, *supra* note 12, at 450-53, Tegeler, Hanley and Liben dismiss “apparent contrary evidence from demonstration studies of the 1970s and early 1980s” as “likely an artifact of a more restrictive program structure at that time” and as “outweighed by recent successes.” Tegeler, Hanley & Liben, *supra* note 7, at 458 and 458 n.23 (citing limitations on early Section 8 use and requirement of at least 50% local government approval for regionwide programs).

¹⁸⁸ *See supra* text at notes 168-185; Tegeler, *supra* note 26, at 230 (noting that the *Gautreaux* mobility program “has been highly successful, in part because it does not involve suburban PHAs in decisions about which families and how many families may live in suburban towns”); Adams, *supra* note 12, at 448 n.144 (noting, however, that “[r]ecently, ... there has been more resistance to the imposition of a Section Eight mobility program in the suburbs where the number of black movers is more substantial”).

¹⁸⁹ Tegeler, Hanley & Liben, *supra* note 7, at 458.

guarantee that minority families will be able to find suitable units in integrated neighborhoods and that they provide only affordability for a limited term compared to the greater permanence of government-owned housing or project-based certificate programs.

b. Consent Decree Terms

As noted above, the NAACP secured in the Consent Decree a commitment for funding the certificate program that extended the vague obligation in Judge Skinner's original Order that merely required HUD to use its "best efforts" to increase the availability of affordable housing in the city. More specifically, HUD agreed to subsidize 200 units of portable Section 8 Existing Housing Certificates having an average of 3 bedrooms, for a maximum of 15 years.¹⁹⁰ Such funding was to be in addition to whatever other funding Boston would receive from HUD in a fair share allocation.¹⁹¹ Beyond the funding requirement, the Decree did not elaborate on the requirements for implementing this provision, leaving a vast amount of discretion to HUD and the BHA.

c. Enforcement History

This absence of program requirements to support the desegregative objectives of the NAACP is among the most striking aspects of the mobility certificate provision. This is particularly surprising given the more expansive nature of programs normally supporting mobility remedies. "Mobility remedies usually involve (1) the distribution to public housing residents of Section 8 certificates ... ; (2) efforts to recruit private landlords and counsel certificate holders to promote the maximum possible choice of location; (3) fair housing offices ... ; and (4) affirmative marketing programs that attempt to induce minority residents of public

¹⁹⁰ See Consent Decree, *supra* note 99, at II.C.2.

¹⁹¹ See *id.*

housing to consider alternative housing outside minority areas.”¹⁹²

But though the Consent Decree might have been improved by the addition of such programs, the defendants’ performance of the basic task of certificate distribution suggested the problems of leaving implementation to their discretion. In particular, the NAACP found that the intended use of the HUD-funded 200 mobility certificates was frustrated by the agencies delegated to distribute them. The major early stumbling block “was that the certificates were given to the BHA and they started to assign them without NAACP approval.”¹⁹³ Since this initial problematic distribution, the NAACP has been working to retrieve these certificates and “get them in the hands of those families they were intended to benefit – minority families making an integrative move.”¹⁹⁴

Though the City was “willing to do the tenant-based certificates,” it was “not eager,”¹⁹⁵ according to the plaintiffs, and used procedures to distribute the certificates that violated the intent - if not the letter - of the Consent Decree. In practice, of the 200 certificates funded by HUD, 100 certificates were awarded by the BHA to families on the waiting list for public housing without respect to race - and without a plan to encourage minorities to move into predominantly white neighborhoods.¹⁹⁶ “‘There was no condition placed on us by HUD or the court on the way we had to issue the certificates,’ said BHA administrator David Cortiella.”¹⁹⁷ Without any regulations governing their distribution or use, it is unsurprising that the BHA’s certificate placements resulted in little to no integration. “According to BHA records, of the families that received the BHA certificates, none moved to suburban communities, and none of

¹⁹² Blair-Loy, *supra* note 162, at 1577.

¹⁹³ Leonard Alkins, current President of the Boston Chapter, NAACP, phone conversation with author, March 3, 1999.

¹⁹⁴ Leonard Alkins, current President of the Boston Chapter, NAACP, phone conversation with author, March 3, 1999.

¹⁹⁵ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

¹⁹⁶ Rezendes, *Five Years Later*, *supra* note 111, at 17.

the 56 black families moved to South Boston, East Boston, Charlestown, or Allston-Brighton - predominantly white neighborhoods with ample supplies of low-cost housing.”¹⁹⁸

Metropolitan Boston Housing Partnership, a non-profit selected to administer the other 100 certificates, achieved similarly disappointing results in the eyes of the plaintiffs. Like the BHA, the Housing Partnership did nothing to structure its distribution – either by screening for minority families or by seeking out families interested in making integrative moves. Instead, the Housing Partnership “did the same thing as BHA, and gave out [its Section 8 certificates] as a matter of course from its waiting list.”¹⁹⁹ Though it was not selective in choosing recipients, the Housing Partnership nonetheless did “develop[] a counseling program to encourage minorities to move to white neighborhoods.”²⁰⁰ But the Partnership believes most of the minority families which received its certificates are living in minority neighborhoods.²⁰¹ Overall, by 1994, of the 200 rent subsidy portable vouchers, 141 had been issued, but 10% were given to whites and “few, if any, were used by minorities who moved to white neighborhoods.”²⁰² This initial distribution has proven crucial to the long-term use of the certificates because since the original assignment of the tenant-based certificates, with limited turnover, they have been in use with families to whom they were originally given.²⁰³

Part of the problem was the discretion reserved in the Consent Decree; HUD believed that the Decree did not create any obligations to limit the recipients to minority families or to

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²⁰⁰ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁰¹ *Id.* The NAACP’s lack of a formal relationship with the Metropolitan Boston Housing Partnership (although they did have “a good working relationship,” according to plaintiff’s attorney James McLindon) may account for these deficiencies, particularly in light of the relative success the *Gautreaux* plaintiffs were able to have in developing implementation plans with the Chicago Leadership Council. See generally Levit, *supra* note 1.

²⁰² Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁰³ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

create procedures to encourage integrative moves.²⁰⁴ Since HUD did not use its authority to place conditions on the certificates it was funding, “[i]t was not clear that anyone knew these were the special ‘Skinner’ certificates – BHA just gave them out to the next 100 clients on the waiting list.”²⁰⁵ This violated what the plaintiffs saw as “[t]he intention of the consent decree[:] that the agency would find minority families ... who are willing to move to integrated areas.”²⁰⁶

Though the NAACP argued that the certificates should be given exclusively to minorities and that public housing authorities should provide support for minority families seeking to move to white neighborhoods or suburbs,²⁰⁷ it is clear that the Consent Decree gave HUD and the BHA some flexibility in interpreting their obligations. As plaintiff’s attorney Jim McLindon noted, “I wouldn’t say that we felt under the consent decree that BHA had to [reserve the certificates for minority families], but [that they] should have done so.”²⁰⁸ The plaintiffs’ expert, Professor Philip Clay, agreed, noting that “there was always confusion about who would get certificates It has to do with who decides [on the recipients]. The City insisted it was up to it to decide who could receive the funding; but the NAACP never agreed to that.” The discretion left to the defendants resulted from the plaintiffs’ limited negotiating leverage; with a “lack of court interest or connection” it was “difficult to get specific about” the requirements imposed on those

²⁰⁴ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁰⁵ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. She adds, “HUD just gave them [the BHA and the Metropolitan Boston Housing Partnership] the money without conditioning [its distribution] on the Consent Decree.” *Id.*

²⁰⁶ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁰⁷ Rezendes, *Five Years Later*, *supra* note 111, at 17. Some commentators have argued vociferously for the necessity of race-conscious remedies. For example, Julian and Daniel reason that “[t]he remedy for a segregated system will almost inevitably have to involve race-conscious remedies. Otherwise, the status quo that is the target of the desegregation process will be frozen into place. The use of apparently race-neutral or color-blind requirements, procedures, or practices to obstruct effective desegregation violates the obligation to disestablish the effects of purposeful discrimination.... These remedial principles are well-established as constitutional principles. The Supreme Court and HUD have accepted these principles as controlling in the case of public housing desegregation.” Julian & Daniel, *supra* note 56, at 672.

²⁰⁸ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

certificates.²⁰⁹ As with the project-based certificates, the efficacy of the remedy was limited by the absence of specific restrictions on the certificates in the Consent Decree, primarily because the plaintiffs lacked the bargaining power to reach a better result. Thus, without a specific constraint on their discretion, the defendants may reasonably claim to have met the terms agreed to, undermining the public pressure the NAACP might otherwise bring to bear. Just as crucially, the Decree failed to provide any incentives - political or economic - for the BHA to use its discretion pursue integrative results.

Nonetheless, the struggle surrounding the implementation of this obligation, like the struggle to pass requisite fair housing enforcement legislation, had a longer term impact on Boston that transcended particular implementation shortcomings: the political climate regarding the use of mobility certificates changed considerably. Its experience with the plaintiffs' demands regarding the Section 8 mobility certificates played a part in softening the BHA's resistance to integrative programs and led to Boston's approval as a recipient of one of HUD's Moving to Opportunity demonstration grants in 1994.²¹⁰ Professor Clay notes that "this lawsuit had its life well before Congress passed [the Moving to Opportunity] legislation. After Congress passed the legislation, it had to find some cities who would take it – and some cities did not want to get the money."²¹¹ After the experience with the NAACP lawsuit, "Boston was more willing and interested in taking the money because the ice had been broken."²¹²

While it is not specifically race-based, the Moving to Opportunity program provides funds for moves which, given the program's requirements for neighborhood placement, should result in greater integration:

²⁰⁹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²¹⁰ Rezendes, *Sharing the Poverty*, *supra* note 118, at 57.

²¹¹ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

²¹² Professor Philip Clay, phone interview with the author, Friday, March 19, 1999.

The [Moving to Opportunity] initiative, which dedicates about \$15 million to each of [five cities, including Boston] during the next five years, does not specifically call for integrating predominantly white higher-income neighborhoods with minorities. But by using Section 8 housing subsidies to move families from public housing in neighborhoods where more than 40 percent live in poverty to communities where fewer than 10 percent live below the poverty line, the program will inevitably move minorities into predominantly white neighborhoods.²¹³

With this grant, HUD and Boston have taken a step beyond their Consent Decree obligations even as they resisted complete fulfillment of its particular terms. How significant a role the lawsuit played in changing attitudes at the BHA is unclear, but it seems likely to have been significant. Boston's current eagerness to participate in the program contrasts sharply with its resistance, prior to the years of litigation, to take steps to expand integrated public housing opportunities.

Despite these advances in Boston's willingness to administer such programs, future advocates should still seek ways to improve their efficacy in making integrative opportunities available to minority families. Most importantly, any success mobility programs might have is limited to the extent it does not adopt procedures that serve to target certificates towards those minority families most capable of and interested in making an integrative move, provide programs to inform them about such a possibility, and seek to amend administrative procedures which restrict participation in the program.

Currently, the effectiveness of the tenant-based certificates is limited by a preference assignment system which tends to place them in the hands of people with the most immediate shelter needs – the homeless, for example – who are therefore least likely to expend the time and energy involved in making an integrative move.²¹⁴ This same preference system is also used

²¹³ Rezendes, *Sharing the Poverty*, *supra* note 118, at 57.

²¹⁴ Professor Philip Clay, phone interview with the author, Friday, March 19, 1999; Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. Federal preference categories include

with the 200 'Skinner' certificates because they have been essentially treated as simply additional Section 8 funding rather than as part of a remedial program - and had similar limitations in promoting integration. "Thomas Bledsoe, director of Metropolitan Boston Housing Partnership, [has noted that] the effort to encourage minorities to move to white communities may have been flawed from the start because recipients of the certificates are chosen from waiting lists of homeless families. 'Generally speaking[,] these people want to move into the first apartment they can find.'"²¹⁵

In addition to eliminating preference schemes in certificate programs dedicated to remedial purposes, affirmative steps are necessary to promote the receipt of certificates by minority families most interested in making an integrative move. Because of the first-come, first-served fashion in which the certificates are otherwise distributed, it is difficult to get participation from interested families;²¹⁶ tenant-based certificates are a very popular program with long waiting lists.²¹⁷ It is therefore important for plaintiffs to seek a requirement that remedial certificates be reserved for those families most capable of making integrative use of the certificates. To the extent plaintiffs think it possible, reforms in the preference system for *all* Section 8 certificates in a jurisdiction, perhaps reserving up to one-third or one-half of Section 8 certificates distributed by a PHA for integrative uses, might be considered.²¹⁸ This would create a norm of integration within the existing programs rather than distinguishing specific "remedial"

those families who are either (1) homeless or living in shelters; (2) involuntarily displaced from prior residence; (3) currently occupying substandard housing; or (4) paying over 50% of the income for rent. See Trent E. Rohrer, *Access to Affordable Housing: The Effect of Court Ordered Programs on Increasing Minority Access to Subsidized Housing Developments Located in Predominantly White Neighborhoods in Boston*, Master's Thesis, John F. Kennedy School of Government, Harvard University, at 34 (1996).

²¹⁵ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²¹⁶ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²¹⁷ According to some estimates, there are ten families on the waiting list for every one recipient family. Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²¹⁸ Advocates including Philip Tegeler, for example, have urged "the transformation of every Section 8 tenant-based certificate program into a regional housing mobility program." Tegeler, *supra* note 26, at 231.

certificates.

Plaintiffs could also seek to address other problems which experts have suggested limit the effectiveness of Section 8 programs in promoting desegregation. For example, to establish incentives for the defendants to comply with desegregative goals, plaintiffs could seek to eliminate the fiscal penalty - the loss of administrative fees - currently paid by PHAs which place their certificates in other jurisdictions within the metropolitan area. A Consent Decree could require HUD to either provide financial incentives to PHAs for promoting regional housing mobility - or at least eliminate financial disincentives.²¹⁹

Furthermore, plaintiffs should seek to have HUD amend the Fair Market Rent (FMR) levels governing certificates to make units in suburban areas available to minority families. FMRs are currently set at 40% of rents in an entire metropolitan area, making some suburbs out of reach for low-income families; “[b]asing FMRs on average metropolitan rents ignores this diversity and geographically circumscribes the areas in which Section 8 recipients can live.”²²⁰ In addition to reforming the FMR calculation, HUD could also require public housing authorities to broaden the circumstances under which they permit “exception rents” of up to 120% of FMR to include families seeking to make integrative moves.

Additionally, the remedial program should seek to emulate the Moving to Opportunity program in providing information and support for minority families potentially interested in integrative moves. According the Lisa Sloane, “the most important thing is just to get people the information,”²²¹ though it is important to provide continued support for families looking to place

²¹⁹ See Tegeler, Hanley & Liben, *supra* note 7, at 480.

²²⁰ Schill & Wachter, *supra* note 2, at 1337. See also Julian & Daniel, *supra* note 56, at 675 (noting that HUD should “reform procedural barriers to affording effective choice such as inadequate Fair Market Rent levels and failure to use exception rents for voucher payment standards”).

²²¹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

their certificates in suburban neighborhoods.²²² Other advocates have proposed a variety of information and counseling reforms PHAs could implement to increase the success of mobility programs. These include written and oral notification to tenants of portability rights, collection and dissemination of unit listings in suburban and nonimpacted areas, outreach to suburban landlords, information on transportation and services in suburban communities, routine approval of exception rents for suburban and nonimpacted units, and providing designated staff to assist families interested in integrative moves.²²³ Similar programs have been sought by the NAACP, which “ideally has always wanted a counseling program that does a lot of the things the Moving to Opportunity program does”²²⁴ Other important reforms could involve increasing flexibility from PHA requirements; Tegeler, Hanley and Liben urge, for example, that “HUD should direct PHAs to grant routine extensions of the sixty-day time limit to families seeking housing outside of low-income or minority-concentrated areas.”²²⁵

Just as important in developing demand for and access to affordable integrated housing however, are efforts to develop interest among landlords potentially participating in the program. Comparing the success of the *Gautreaux* program, which includes such landlord recruitment, with other mobility programs “suggests that recruitment of landlords and counseling of tenants is essential to providing a viable choice of locations by overcoming the barriers of residential segregation.”²²⁶ Even without efforts to recruit landlords, a strengthened program to assist

²²² Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²²³ See Tegeler, Hanley & Liben, *supra* note 7, at 482.; see also Julian & Daniel, *supra* note 56, at 675 (urging that programs “provide counseling and transportation”); Roisman, *Response*, *supra* note 8, at 1377-78 (“Mobility programs should be not only replicated but improved.... [T]he Gautreaux program succeeds despite the fact that the families do not receive educational counseling or supplemental assistance with employment, child care, transportation, or other problems.”); Schill & Wachter, *supra* note 2, at 1338 (“experience has shown that providing information to tenants about communities outside their immediate neighborhoods and assistance in locating available apartments can be useful”).

²²⁴ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²²⁵ Tegeler, Hanley & Liben, *supra* note 7, at 483.

²²⁶ Blair-Loy, *supra* note 162, at 1577 n.239 (contrasting *Gautreaux* to a program in nearby Cook County). Other

families in placing their certificates in Boston's suburbs might meet some heightened success given that Massachusetts prohibits discrimination on the basis of the source of a tenants' income, barring landlords from discriminating against Section 8 recipients.²²⁷

Plaintiffs with greater bargaining leverage could also seek broader transformation in the operation of Section 8 programs as a form of relief, incorporating within the normal operation of the program administrative changes that would enhance the program's integrative potential. Much of the racially disproportionate use of the program derives from disproportionate allocations of Section 8 certificates between municipalities.²²⁸ Settlement negotiations, in the proper context, could be used to require HUD to alter or eliminate its allocation processes in ways more likely to place certificates in the hands of minority families seeking to make suburban or other integrative moves. As has occurred with the Leadership Council in the aftermath of *Gautreaux*, for example, "HUD could begin to administer new housing mobility programs directly or through regional nonprofit agencies"²²⁹

If the vested interests of local PHAs render such change unlikely, plaintiffs could seek, alternatively, that HUD require metropolitan PHAs to cooperate in eliminating administrative requirements that act to limit receipt of certificates by minority families.²³⁰ In particular, HUD should be obligated to act to reduce the duplicative application requirements imposed by individual PHAs. Myriad administrative alternatives could ease access to the program: utilizing a single administrator; coordination of PHAs administration with one single, central waitlist; a

analyses have similarly stressed the importance of such efforts. See, e.g., Julian & Daniel, *supra* note 56, at 675 (proposing that HUD "require effective recruitment of private landlords, subsidized and unsubsidized"). Others have noted reluctance among landlords to participate in the program ("[S]ome evidence suggests that one of the reasons the Section 8 program has not achieved substantial deconcentration is that many landlords are reluctant to offer apartments to recipients of the subsidies."), but attribute it to requirements imposed by participation in the Section 8 program. Schill & Wachter, *supra* note 2, at 1338.

²²⁷ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²²⁸ See Tegeler, Hanley & Liben, *supra* note 7, at 468-71.

²²⁹ Tegeler, *supra* note 26, at 231.

multipoint access system with application to one PHA placing on the waiting list for all; or, at least, PHA provision of uniform application forms.²³¹ More broadly, all of the reforms described in this section could be made part of a systematic Housing Mobility Plan HUD would then require each PHA to develop and have approved as a condition for receipt of future grants and subsidies.²³²

Although the administrative changes proposed here are described to provide advocates with suggestions for future reform, the crucial dimension in establishing an effective remedial scheme will be providing financial and political incentives from HUD for localities to make these pro-integrative changes in their policies. Though the Consent Decree in this case failed to do so, the political pressures it generated may have resulted in sufficient impetus for future reform.

4. Integration Through Access to Subsidized Housing: Metrolist

The plaintiffs' aspirations to increase integration of existing subsidized housing units in the Boston metropolitan area met with similar frustrations. Though the City technically implemented the program required under the Consent Decree and funded by HUD, it did not seek to use the new apartment listing service to truly expand integration in existing housing. As with the project-based and mobility certificates, the NAACP found itself with no enforcement mechanisms to press for greater substantive results when it became clear that the apartment listing program was limited in its effectiveness. As the Order and subsequent Consent Decree left implementation to the locality without providing for future sticks or carrots to incentivize substantive performance, only a handful of projects experienced any significant integration.

²³⁰ See *infra* text at notes ____ - ____.

²³¹ See Tegeler, Hanley & Liben, *supra* note 7, at 475-76.

a. Plaintiff's Aspirations

The NAACP sought to establish a program to increase minority access to existing subsidized housing by providing information on vacancies in all assisted housing in one centralized list. Wider availability of this information could enhance access to all housing vacancies for minority families who would otherwise be less likely to learn of housing opportunities predominantly in white neighborhoods and the suburbs. Through the provision of this information, the NAACP hoped, "to achieve a racial composition in subsidized housing developments located in predominantly white neighborhoods [and the suburbs] that mirrors the City as a whole; i.e., 59% white, 41% minority."²³³ Thus, existing patterns of segregation in subsidized housing could be reduced by increasing the access of minority families to predominantly white developments.

b. Consent Decree Terms

Retaining the provision in Skinner's original Order, the Consent Decree required the Boston Fair Housing Commission to operate a Boston Housing Opportunity Clearing Center ("Metrolist"), which would list all public or private housing units available for sale or rental in the Metropolitan Area that fell within the Decree's definition of federal or state-assisted housing,²³⁴ as well as any private units which voluntarily sought to be included.²³⁵ The success of the program would depend on the compliance of the owners of such assisted housing. The

²³² See Tegeler, Hanley & Liben, *supra* note 7, at 484-85.

²³³ Rohrer, *supra* note 214, at 2 (paraphrasing the Consent Decree).

²³⁴ HUD-assisted projects were defined to include all rental housing of five or more units receiving any subsidy in whole or in part from HUD. Other limitations on the housing meant to be included in the Consent Decree were specifically enumerated. For example, mortgage insurance, Title I programs, PFD Homeowner Services and Senior Home Repair Programs, were exempted. See Consent Decree, *supra* note 99, at II.A. (The parties thus encoded into the Decree a "commonsense" notion of assisted housing, refusing to define subsidies for middle and upper class homeowners as placing those units in the federally-assisted stock.) Furthermore, even the mandate regarding covered properties was not absolute; HUD would be exempted from imposing such obligations where it was required to enter into an agreement with an owner or a PHA which nonetheless refused to accept conditions. See Consent Decree, *supra* note 99, at II.A.

Consent Decree therefore obligated “HUD [to] engage in efforts ... to encourage owners and managers of housing in the Metropolitan Area to participate fully in [Metrolist]” and that HUD require PHAs in the Metropolitan Area to submit information relevant to their selection procedures and waiting lists to Metrolist.²³⁶ All affirmative fair housing marketing plans for HUD-assisted project-based housing in predominantly white neighborhoods were to have as their goal a composition of tenants which reflects the racial composition of the City as a whole.²³⁷ In addition, the NAACP was able to negotiate a commitment from HUD to fund Metrolist with a total of \$700,00 over 4 fiscal years (FY 91 - FY 94).²³⁸

In addition, the Fair Housing Commission was obligated to operate an Affirmative Fair Housing Marketing Program, requiring all city-assisted housing “to pursue affirmative fair housing marketing policies in soliciting buyers and tenants, in determining eligibility and in concluding sales and rental transactions,” with the goal of reaching, in predominantly white neighborhoods, a composition of tenants which reflects the racial composition of the City as a whole.²³⁹

c. Enforcement History

As currently implemented, Metrolist requires that all owners and managers of HUD-subsidized housing list all their vacancies. The projects included encompass more than 500 developments in approximately 120 cities and towns in the Boston Metropolitan region.²⁴⁰ Metrolist provides these listings for low-income families in search of housing, as well as

²³⁵ See *id.* at II.B.2.a. See also Boston Settlement Agreement, *supra* note 100, at §8 (Boston agrees to create and operate Metrolist as established in Decree).

²³⁶ Consent Decree, *supra* note 99, at II.A. In addition, HUD agreed to require City to impose on all City-assisted housing an agreement “to participate fully in programs designed to enhance access to low-income housing by low-income Black households.” *Id.* at II.B.1.

²³⁷ See *id.* at II.A.

²³⁸ See *id.* at II.D.2.

²³⁹ *Id.* at II.B.2.d.

²⁴⁰ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the

information about how to get on waiting lists, and assists the families in performing internet searches to locate appropriate housing.²⁴¹ The program is currently administered by Fair Housing Commission, though for a period in the mid-1990s, it was operated by the nonprofit Metropolitan Boston Housing Partnership.

Metrolist assists approximately 1,000 families per year; 75% of its clientele is minority.²⁴² This high percentage reflects both the composition of low-income families in the area searching for housing and marketing and outreach directed to people of color as required by the Consent Decree.²⁴³ Over 50% of Metrolist clients are placed in housing or on a waiting list.²⁴⁴ Marlena Richardson, the program's administrator, notes that three HUD performance reviews, the most recent of which was performed in 1996, found "that the list was meeting or exceeding the requirements of the HUD Consent Decree."²⁴⁵

Despite these HUD findings, there has been strident criticism of Metrolist's performance. The Boston Globe has reported that Metrolist "is rife with administrative problems and has failed to meet expectations."²⁴⁶ One of the most common criticisms is that Metrolist "has never offered complete or up-to-date information."²⁴⁷ Others have noted that "[b]ecause the information in Metrolist's database is both limited and out-of-date, the information that clients receive is often

author, March 10, 1999.

²⁴¹ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁴² Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁴³ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁴⁴ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁴⁵ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁴⁶ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁴⁷ *Id.* Adds Leonard Alkins, the current President of the Boston Chapter, NAACP, the listings are "not accurate." Leonard Alkins, current President of the Boston Chapter, NAACP, phone conversation with author, March 3, 1999.

inaccurate.”²⁴⁸ Even HUD officials admit that the information provided is inaccurate.²⁴⁹

The length of waiting lists at many projects and the fact that individual projects maintain separate lists has also served to frustrate the aim of Metrolist: to ease minority families’ search for housing in predominantly white areas in the City and the suburbs. As one analysis of the program concluded:

All of the subsidized developments in the City of Boston have extensive waiting lists and the units do not turn over rapidly. As a result, most of the waiting lists range from 18 months to five years. Furthermore, HUD has permitted many of the developments to close their waiting lists and not accept any new applicants. Even applicants who qualify for federal preferences do not move to the top of the lists because 50 to 75 percent of the applicants on most waiting lists meet the federal preference criteria.²⁵⁰

Therefore, the effect of Metrolist for much of this housing is simply to allow minorities access to waiting lists; even those apartments that do get listed may not be truly “available” to minority families using Metrolist in their housing searches.

Furthermore, “Metrolist administrators at the Boston Fair Housing Commission say that, even when vacancies come in, the suburban apartments are usually unavailable because owners of the units use their own waiting lists to fill the vacancies.”²⁵¹ A 1996 report found that many managers refuse to list their vacancies, despite HUD’s recent efforts to increase enforcement of its listing requirements.²⁵² As NAACP, Boston Chapter President Leonard Alkins notes, “you’re dealing with realtors who try to frustrate the purpose of the consent decree,” and owners or managers who will either delay reporting vacant units or will find an excuse to deny placement to a minority family.²⁵³ In fact, “[t]he NAACP [has] charged that HUD has never followed

²⁴⁸ Rohrer, *supra* note 214, at 35.

²⁴⁹ See Adrian Walker, *Apartment Listing Service Called a Flop*, THE BOSTON GLOBE, Nov. 19, 1992, at 34.

²⁵⁰ Rohrer, *supra* note 214, at 34.

²⁵¹ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁵² See Rohrer, *supra* note 214, at 35.

²⁵³ Leonard Alkins, current President of the Boston Chapter, NAACP, phone conversation with author, March 3, 1999.

through on a commitment to require the owners of all HUD-assisted suburban housing to list vacancies.”²⁵⁴ Victoria Williams, executive director of the Fair Housing Commission, has also charged that HUD has failed in its obligation to require participation by federally-subsidized landlords.²⁵⁵

Critics have also noted that Metrolist provides only limited assistance in housing searches, capping the information provided to three listings per visit.²⁵⁶ More importantly, Metrolist does not provide supplemental assistance to families searching for housing. It does not offer counseling services or attempt to assist the search process by providing either transportation to vacancies or offering applications at a central office.²⁵⁷ Finding the program significantly flawed, Thomas Bledsoe, director of the Metropolitan Boston Housing Partnership, which had won the contract to manage Metrolist in 1992-93, declined to renew it. “‘We found that the listings weren’t helping families very much and it didn’t seem like things were going to change,’ Bledsoe said.”²⁵⁸ The myriad problems are so great, that again “[a]ttorneys for the NAACP contend that HUD and the city have violated the spirit, if not the letter, of the consent decree.”²⁵⁹

Responding to these criticisms, Richardson admits that sometimes private listings are out-of-date, but Metrolist does not have the administrative staff to keep all unit listings absolutely current.²⁶⁰ Instead, private listings are automatically removed after being on the list for 2 months.²⁶¹ Furthermore, she notes that the Fair Housing Commission is nonetheless meeting the

²⁵⁴ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁵⁵ See Walker, *supra* note 249, at 34.

²⁵⁶ Rohrer, *supra* note 214, at 37.

²⁵⁷ See *id.*

²⁵⁸ Rezendes, *Five Years Later*, *supra* note 111, at 17.

²⁵⁹ Walker, *supra* note 249, at 34.

²⁶⁰ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁶¹ Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the

requirements imposed on them; “the Decree requires listing only, not placement.”²⁶² As with the implementation of the mobility certificates, the discretion left to the defendants by the Decree operates to shield the Commission from action by the NAACP. Because the remedy gives HUD and the City discretion in implementing the solution to the discrimination they themselves perpetrated, they may comply with the mere procedural requirements it imposes without any need to seek the substantive integration aspired to by the Decree. In this way, again, the absence of enforcement mechanisms in Judge Skinner’s original Order - brought forward into the Consent Decree - left the plaintiffs without legal leverage to force changes in the Metrolist program to better meet its intended results.

The limited legal constraints on its operation has essentially allowed Metrolist to operate without playing a significant role in increasing minority occupancy of developments in predominantly white neighborhoods within the city of Boston according to a 1996 report by Trent Rohrer.²⁶³ Rohrer’s report found that while there has been a significant increase in minority occupancy in some developments, thereby appearing to increase integration in projects overall, the tenant composition in most projects has remained essentially the same. Specifically, his analysis of the occupancy data in federally and state subsidized multifamily developments found that:

from February 1991 to February 1996 there was a statistically significant 7.6 percent increase (from 28.9% to 36.5%) in the number of minority households living in subsidized housing developments located in predominantly white neighborhoods. However, the present occupancy percentage (36.5% in February 1996) falls short of the goal of the Consent Decree programs, which is 41%. In

author, March 10, 1999.

²⁶² Marlena Richardson, Metrolist Administrator for the Boston Fair Housing Commission, phone interview with the author, March 10, 1999.

²⁶³ See Rohrer, *supra* note 214, at 32-33. Rohrer’s analysis is limited to certain Section 221(d)(3) BMIR, Section 236, and Section 8 New Construction/Rehab (project-based certificate) projects; he also includes only those that are primarily affordable housing (excluding those projects that have a high percentage of market-rate units). Though this makes the report less comprehensive, his methodology suggests that it is nonetheless representative. See *id.* at 13-16.

addition, and most importantly, the 7.6 percent increase is due to large increases in minority occupancy levels at seven (7) of the 37 subsidized developments located in predominantly white neighborhoods. This demonstrates that the progress made is not indicative of the City of Boston as a whole.²⁶⁴

The report stresses that "if the population changes that occurred at these seven developments were excluded from the analysis, then there would have been no change in the total minority occupancy levels from February 1991 to February 1996."²⁶⁵ In addition to the limited progress on the integration in a few projects in predominantly white neighborhoods, the high concentration of minority families in units in non-white neighborhoods persists, though, admittedly, the Decree was not structured to address this problem. Rohrer reports that over 93% of the units in these neighborhoods are occupied by minority families, a figure which has persisted essentially unchanged since at least 1991.²⁶⁶

Furthermore, Metrolist played almost no role in the increase in minority occupancy that did transpire. Rohrer found that "[t]he overriding reason for the minority increases at these developments is high unit turnover relative to the other developments, combined with minority dominated waiting lists."²⁶⁷ Unfortunately, attributing integration to high turnover rates does not offer much hope to those seeking ways to hasten integration in such projects as a whole. In

²⁶⁴ *Id.* at 12-13. Rohrer notes that the data he uses differs from that offered in the HUD occupancy reports (submitted as part of the Consent Decree) because HUD incorrectly listed several projects with high minority occupancy levels as being in predominantly white neighborhoods when, according to BRA data, they were in fact in areas of high minority concentration. *See id.* at 19-23. This difference is crucial: "In February 1996, according to the incorrect data, minorities occupied 42.2% of the units [in predominantly white neighborhoods], while they actually constituted only 36.5% of the units. Because the Consent Decree defines the goal of its mandated programs as 'the achievement of a racial composition [in units in predominantly white neighborhoods], which reflects the racial composition of the City as a whole,' (59% white, 41% minority) this difference is extremely important. While the incorrect ... data indicate that the Consent Decree goal has been met, in actuality, the minority occupancy levels as of February 1996 are still 4.5% short of the stated goal." *Id.* at 23. Given this problem, Rohrer makes a number of suggestions for improvements in HUD-reported occupancy data. *See id.* at 38-41.

²⁶⁵ *Id.* at 28. The occupancy patterns in projects located in predominantly white neighborhoods may be contrasted with the change in the overall composition of this category of assisted housing: "In February 1991, 66.3% (10,866) of the units were occupied by minority households and 33.7% (5,519) were occupied by white households. By February 1996, the minority occupancy increased to 69.5% (11,336), while white occupancy dropped to 30.5% (4,969)." *Id.* at 16. It is important to note that Rohrer's report does not analyze changes in occupancy in suburban projects, which was also an important goal of the Consent Decree.

1996, these projects experienced a 97% occupancy rate overall,²⁶⁸ and most had only five to ten units turnover per year.²⁶⁹ Rohrer also speculates that changes in the racial composition of the neighborhoods where such projects are located may be related to increases in minority occupancy levels at the seven developments that did experience such increases.²⁷⁰

Significantly, even at these seven developments with the greatest minority occupancy increases, the managers reported to Rohrer that Metrolist had no impact on their developments; some even noted that they did not report vacancies to Metrolist because they were able to fill them quickly from their own waiting lists.²⁷¹ During this period, it is unlikely Metrolist *could* have had any impact given its long waiting lists, averaging over five years.²⁷² In addition, the managers “stated that the affirmative marketing programs have little effect. Most do not advertise because of the large waiting lists. They stated that minorities [apply] because they hear of the development through word-of-mouth.”²⁷³ The limited turnover combined with the discretion exercised by individual managers in selecting tenants strongly suggests that Metrolist can only have its full impact if the waiting lists for such assisted housing are centralized. Just as the NAACP found that it could only integrate public housing by requiring a centralized tenant selection and assignment plan in place of earlier “choice” plans, plaintiffs in future cases should push for similar arrangements in assisted housing.

Because the administration of the Metrolist program has been left to the discretion of the defendants, it has played virtually no role in integrating federally-assisted projects in

²⁶⁶ *See id.* at 24-25.

²⁶⁷ *Id.* at 30.

²⁶⁸ *Id.* at 16.

²⁶⁹ *Id.* at 30.

²⁷⁰ *See id.* at 30-32. Rohrer was not able to assess this speculation because new census data were not available when his report was written. Unfortunately, it is beyond the scope of the paper to investigate this change.

²⁷¹ *See id.* at 32.

²⁷² *Id.* at 33.

²⁷³ *Id.*

predominantly white areas. Given the lack of enforcement mechanisms in the Consent Decree, the plaintiffs have been left without legal power to force HUD or the Fair Housing Commission to implement changes in the program that might compensate for its current inadequacies and allow the program to realize some of its integrative potential.

5. Preventing the Depletion of Affordable Housing: Demo-Dispo

The Consent Decree's prohibition on any action by HUD that would have the effect of reducing the number of affordable housing units in the Boston metropolitan area engendered the most cooperation between the parties. Because it left no discretion to HUD, this term forced negotiation with the NAACP which established a procedural framework for property disposition capable of meeting the interests of both sides. The implementation of this term also benefited from the independent economic incentives HUD had to compromise with the plaintiffs, as well as a generally supportive political environment.

a. Plaintiff's Aspirations

During the 1980s and 1990s, one of the major threats facing low-income families in general and minorities in particular was a potential depletion of affordable housing stock in the Boston metropolitan area. Mismanaged federally-assisted projects, both city run and privately operated developments had, in a number of cases, depleted their finances; unable to effectively manage the properties, they allowed the developments to deteriorate until HUD took receivership of them. By the time of the Consent Decree, HUD had foreclosed on ten or eleven properties and 2,000 units in Boston (and later added a few additional developments).²⁷⁴ Under the federal Demonstration-Disposition Program (Demo-Dispo), HUD sought to ease the tremendous costs of

²⁷⁴ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999. A list of HUD's foreclosed developments, then numbering thirteen, is provided in Matt Carroll, *The MHFA Way: Housing Agency's Plan to Sell Property in Deteriorating Boston Neighborhoods May Become a National Model*, THE BOSTON GLOBE, Oct. 24, 1993, at A45.

holding foreclosed-upon properties by contracting with state housing finance agencies to sell the developments and provide for their rehabilitation or demolition.²⁷⁵

Since rehabilitation programs usually resulted in a decrease in density and therefore a reduction of the total number of units in a property – as well as displacement of current residents – Boston faced a potential loss of affordable housing at a time when the market for such housing was already extremely tight. Even worse, given the tenant composition of the Demo-Dispo projects, the burden would fall disproportionately on minority families.²⁷⁶ The NAACP sought to allay this threat by restricting HUD's ability to approve any disposition of these units (and any others not included in the Demo-Dispo program) that had the effect of reducing the supply of affordable housing. Although this program was unlikely to have any significant desegregative impact - all the projects likely to be included in the Demo-Dispo program are situated in minority neighborhoods and are comprised almost exclusively of minority families²⁷⁷ - it would nonetheless protect the minority families who would have been disproportionately harmed by the likely disposition of these projects.²⁷⁸

Thus, this form of relief serves a different goal neglected by the other programs in the Consent Decree: leveraging HUD resources that might improve areas of minority concentration

²⁷⁵ See *id.* The difficulties HUD faced in holding these properties were compounded by its administrative structure, limited resources, and staffing shortages, making it unable to respond to deteriorating conditions in the developments. See *id.*; *A Brighter Housing Picture*, THE BOSTON GLOBE, Apr. 12, 1994 at 18.

²⁷⁶ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁷⁷ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²⁷⁸ Some academics have reasoned that loosening rather than strengthening replacement rules would promote integration and ultimately benefit minority residents more. For example, Schill and Wachter claim that [r]elaxing the restrictiveness of the replacement rules would not only improve inner-city neighborhoods, but would also promote deconcentration. If PHAs were able to replace demolished public housing units by providing former tenants with housing vouchers or certificates, not only would neighborhood eyesores and nuisances be removed, but recipients of the housing subsidies would be given the opportunity to locate housing outside of their current neighborhoods.

Schill & Wachter, *supra* note 2, at 1340. Though such considerations have merit, given the state of the Boston housing market, the loss of such affordable housing might leave those with certificates in competition with one another for increasingly few affordable units; a large number would be unlikely to find housing within the city and

for the existing residents, most of whom will not be able to take advantage of integration-oriented programs. In particular, the other programs created by the Consent Decree - Metrolist, fair housing enforcement, mobility and project-based certificates - do little to address directly the harm created by the concentration of poverty in a neighborhood, and therefore do not ameliorate conditions for the majority of minority families which would not be reached by even the most aggressive expansion in federally-assisted housing. As others have noted, housing mobility and scattered-site construction programs are "inadequate when [they are] the only form [of relief] offered to low-income black Americans in the federally subsidized housing program, because [they] cannot address the myriad harms arising from systemic discrimination."²⁷⁹ Even strong advocates of housing mobility recognize the importance of these considerations.²⁸⁰ Thus, in addition to using suits to leverage additional funding for integrative programs, "advocates should ... require the use of HUD, state, and local funds to rehabilitate and modernize minority projects to the same standards as white elderly or white HUD-assisted projects [and] require the use of [such] funds for neighborhood revitalization in order to provide conditions equal to those around the white projects."²⁸¹

b. Consent Decree Terms

Judge Skinner had in fact included a provision in his original Order which spoke to this very concern, requiring HUD to assure that no affordable units would be lost. The Consent Decree similarly provided that "HUD shall not agree to any disposition of HUD-assisted

would be forced to move to another part of the country or made homeless.

²⁷⁹ Adams, *supra* note 12, at 420. Professor Adams and others have therefore made vociferous arguments for the kind of equalization relief implicit in John Calmore's concept of "spatial equality," which "focuses on the enrichment of the black community itself via the improvement of black neighborhoods." Adams, *supra* note 12, at 418.

²⁸⁰ See Tegeler, Hanley & Liben, *supra* note 7, at 461 ("The values of opportunity, desegregation, and choice must also be balanced against the importance of equalizing housing and neighborhood conditions in segregated low-income neighborhoods, where many, if not most, families will choose to stay.")

²⁸¹ Julian & Daniel, *supra* note 56, at 675.

multifamily housing which has the effect of reducing the supply of affordable HUD-assisted multifamily rental housing in the City available as of the effective date of this Decree.”²⁸² This established significant future bargaining power for the NAACP at the implementation level because HUD would have to negotiate with the NAACP over the disposition of virtually all the affected properties since most proposed dispositions involved a reduction in the number of units.

c. Enforcement History

Because it presented a bar to HUD action, rather than requiring programs to be administered under local discretion, this Decree requirement could be easily enforced, if necessary, given the court’s well-accepted injunctive power. In addition, HUD incurred costs ranging in the billions while it held such foreclosed properties and thus faced “Congressional pressure to get the problem under control.”²⁸³ It was therefore eager to find in Boston a model it could use in disposing of other projects nationwide.²⁸⁴ Given HUD’s external incentives to cooperate with the NAACP, this obligation appears to have been marked by the most cooperation between the parties. As one attorney for the NAACP noted, the NAACP has “worked pretty cooperatively with the tenants groups and HUD on [the Demo-Dispo program].”²⁸⁵

Given that plans for the disposition of these properties would generally involve a reduction in the number of units, HUD and the Massachusetts Housing Finance Agency

²⁸² See Consent Decree, *supra* note 99, at II.C.3. Certain units – those subject to Section 18 of U.S. Housing Act of 1937 – were excepted from this requirement. *See id.*

²⁸³ Carroll, *supra* note 274, at A45.

²⁸⁴ *See id.*

²⁸⁵ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999. The cooperation between the parties extended beyond the projects covered by the Demo-Dispo program. For example, in March 1994, the plaintiffs and HUD moved jointly to permit a limited exception to the Consent Decree for “a resident buyout of the Charlesbank Apartments in Boston which would result in the conversion of the apartments from rental to cooperative ownership.” Joint Motion for a Further Order Permitting an Exception to the Consent Decree, *NAACP, Boston Chapter v. Cisneros*, Civil Action No. 78-850-S at 1 (D. Mass. March 22, 1994). The conversion to a new limited equity ownership structure supported the NAACP’s goals of preserving affordable housing opportunities.

(MHFA), a state agency funded to operate the Demo-Dispo program “with a lot of oversight from HUD,”²⁸⁶ reached an agreement with NAACP to establish an approval process for proposed dispositions of the property in March 1994.²⁸⁷ The NAACP sought an arrangement which would require consultation at an early stage; “we were always afraid of being presented with a done deal that we couldn’t approve.”²⁸⁸ By contrast, the MHFA wanted a program that would not present developers – who submitted plans for redevelopment of each project to the MHFA – with roadblocks late in the negotiations. The 1994 agreement, a compromise position,²⁸⁹ created a “system to give tentative approval [from the NAACP], allowing them to present their concerns – primarily that the proposals had decent good units with a sufficient funding scheme so that units would be preserved for long term.”²⁹⁰ The scheme also provided for final sign-off by the NAACP later in the process to assure that no substantial change from the original proposal had occurred.²⁹¹ In exchange, the NAACP agreed to limit the grounds for its objections regarding potential development plans.²⁹² As of mid-1999, most projects in the Demo-Dispo program have gone through initial review, but have not been completely signed off on.²⁹³

To the end of broader participation throughout the process, the MHFA, going beyond the Consent Decree obligations, has “provided a lot of money to the affected tenant organizations to

Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁸⁶ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999. The MHFA became involved in the disposition process on September 14, 1993, when HUD announced the award of its demonstration grant to MHFA. See *A Second Chance for Housing*, THE BOSTON GLOBE, Sept. 15, 1993 at 12. MHFA officially took control of the developments in August, 1994. See *Housing: Help or Harm?*, THE BOSTON GLOBE, Aug. 24, 1994, at 14.

²⁸⁷ See Demo-Dispo Side Agreement, on file with author, 1994.

²⁸⁸ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²⁸⁹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁹⁰ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²⁹¹ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁹² See Demo-Dispo Side Agreement, on file with author, 1994. For example, the NAACP agreed that it would not be permitted to object to a reduction in the number of units as violative of the Consent Decree “(1) if the only issue is the reduction of units designed to (a) create larger units, (b) create accessible units for persons with disabilities, (c) create community space or (d) eliminate illegal units, and the reduction is less than 5% of the existing units in the project.” *Id.*

hire their own lawyers and housing consultants to design replacement housing.”²⁹⁴ As the MHFA’s Eleanor White noted, “[t]his will be a resident-centered process.”²⁹⁵ In fact, “MHFA’s goal is to sell the developments, ideally back to the residents They may also be sold jointly to the tenants and a non-profit or a community development corporation.”²⁹⁶ The MHFA, relatively well-funded in comparison to HUD, also sought to “provide an extensive array of social programs.”²⁹⁷ Summarizes James McLindon, “Fortunately, we never had a situation where we thought someone, tenant group or otherwise, was doing something that was bad for the tenants.”²⁹⁸ In addition to these programs to benefit tenants, the MHFA also sought to benefit the minority community by setting aside some 80% of the construction contracts for minority developers.²⁹⁹

To the extent the Demo-Dispo program faced difficulties in implementation, they were not due to disputes between the plaintiffs and HUD. Instead, problems were a result of the broader political context: Congressional curtailments of HUD funding in 1995, resulting in a threatened shortfall of \$100 million of the estimated \$200 million that was needed to complete the projects,³⁰⁰ and federal reluctance in the wake of *Adarand* and *Croson*³⁰¹ to implement the

²⁹³ Lisa Sloane, Sloane Associates, consultants to the NAACP, phone interview with the author, March 12, 1999.

²⁹⁴ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999.

²⁹⁵ Quoted in *A Second Chance for Housing*, THE BOSTON GLOBE, Sept. 15, 1993 at 12.

²⁹⁶ Carroll, *supra* note 274, at A45.

²⁹⁷ *Id.* (describing programs regarding alcohol and drug abuse, parenting, domestic violence, and youth opportunities).

²⁹⁸ James B. McLindon, phone interview with the author, Tuesday, March 16, 1999. This is not to suggest that disputes have not arisen during the course of Demo-Dispo implementation. Indeed, there have been heated struggles between tenant groups and the MHFA, particularly concerning whether they would have to move during redevelopment or whether it could be conducted while tenants live on-site. See Michael Grunwald, *Obstacles Beset Boston’s \$200M Housing Overhaul*, THE BOSTON GLOBE, Aug. 28, 1996, at A1. However, the disputes that have arisen seem to involve temporary construction-related issues rather than representing any intention on the part of the MHFA or HUD to avoid the intent of the Consent Decree. Furthermore, it was the participatory structure which MHFA facilitated which allowed these concerns to be raised. See *Moving Problems for the MHFA*, THE BOSTON GLOBE, Aug. 31, 1996, at A10.

²⁹⁹ See Victoria Benning, *Minority Firms to Reap \$3.3M in Housing Work*, THE BOSTON GLOBE, Sept. 12, 1994, at 21 (announcing first round of contract awards).

³⁰⁰ See Michael Grunwald, *Weld, Clinton Aides Seek to Save Housing Plan: Funds in Doubt for Renovation of 1,900 Units*, THE BOSTON GLOBE, Apr. 27, 1995, at 29; Michael Grunwald, *US Funds for Hub Housing Plan in Jeopardy*,

aggressive construction contract set-aside programs the MHFA had planned to implement.³⁰²

Despite these political roadblocks, the plaintiffs, HUD, and MHFA have nonetheless been able to keep their disposition plans on track, if a bit behind schedule.

The experience also suggests that the NAACP was able to achieve the most harmonious results where it had the most enforcement leverage: an injunction against HUD disposition would be easier to receive than an order requiring specific programs to be enacted under either the Metrolist or certificate program obligations. Furthermore, though it was not part of the "enforcement" scheme of the Decree, HUD had independent incentives to seek an expeditious resolution of the problem; the financial pressures faced by HUD provided significant incentives to cooperate with the NAACP finding a procedure for implementation that would satisfy the interests of both sides. In addition, as suggested with the fair housing legislation, the relative eagerness with which HUD and MHFA complied with their Consent Decree obligations was abetted by the limited political resistance to these programs (except regarding their construction set-asides).

IV. Conclusion: Notes on the Efficacy of Institutional Litigation

The *Boston Chapter*, NAACP experience reveals much about the efficacy and limits of institutional litigation. The Consent Decree provisions provide an opportunity to analyze how different provisions within the same Decree could meet with widely different results at the implementation level.

THE BOSTON GLOBE, Jul. 13, 1995, at 1; Michael Grunwald, *HUD Says City Housing Plan Still Viable: But Menino Says Shortfall of \$100M Would Be Disaster*, THE BOSTON GLOBE, Jul. 14, 1995, at 18 (noting that HUD had allocated \$100 million for Boston of its nationwide budget of \$500 million);

³⁰¹ See *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding certain affirmative action programs unconstitutional).

³⁰² See Michael Grunwald, *Goal is Cut for Minority Contracts: Officials Feared Court Challenge to \$200M Boston Housing Rehab*, THE BOSTON GLOBE, Oct. 11, 1996, at A1. By 1997, there were concerns about the ability of smaller contractors to undertake contracts of the scope involved. See Adrian Walker, *City Housing Plan Lagging: Goals for Awarding Contracts to Minority Firms Appear Shaky*, May 30, 1997, at A1.

The Consent Decree provisions requiring fair housing legislation, drawn from Judge Skinner's original Order, revealed themselves to be among of more readily implemented portions of the Consent Decree. Contrary to numerous "conservative" critiques of institutional litigation, which generally urge that the Courts can only weakly (and illegitimately) stir legislatures to action,³⁰³ this case demonstrates significant success in producing remedial legislation from both the city and the state. The passage of such legislation within three years of the Decree, a short period considering the resistance sometimes encountered in similar cases, suggests that district courts may be most effective where they are able to use the threat of injunctive power to prohibit federal agencies from continuing to fund local and state bodies who fail to produce required remedial legislation. As suggested above, this case did not involve the court in coercing the legislature but instead, through the Consent Decree's restriction on HUD funding, caused the agency to pressure the legislators with threatened withdrawal of funds.

By structuring a remedy to provide incentives for action rather than mandates, the plaintiffs increase their opportunity to gain relief without risking a direct confrontation between a district court and a legislative body. Such confrontations typically hamper their own effectiveness by bringing into bolder relief the "undemocratic" aspects of the District Courts (increasing the defendants' desire to resist) and chill judges with an atmosphere of undesired political antipathy. In his willingness to impose a strict limit on HUD funding in this area, Judge Skinner laid the groundwork in his Order for a relatively successful remedy in this area, albeit one that faced, for a period, certain unavoidable vagaries of the political process.

In addition, the Decree's fair housing requirement also built on existing political support by forcing onto the legislative an issue that, in theory, had widespread political support. By giving the lawmakers an economic incentive to pass the requisite legislation, the Decree also

³⁰³ See generally Horowitz, *supra* note 148.

created increased pressure to act.

While it did not require legislative action, the property disposition restrictions imported from Skinner's original Order into the Consent Decree achieved relative success because of their similar implicit enforcement structure. As with the requirement that HUD condition funding on fair housing legislation, this provision - barring action by HUD rather than requiring it - offered the ready enforcement mechanism of judicial injunction against HUD action. This enforcement threat preserved the plaintiff's bargaining power at the implementation level, resulting in high levels of cooperation between the parties, as had been evidenced in the joint effort of HUD, the City, and the plaintiffs to win passage of the fair housing legislation. In addition, the Demo-Dispo program presented a situation in which HUD had economic incentives to accommodate the NAACP; the cost of continuing to hold disposition properties pressured HUD to compromise on a procedural framework which could serve the interests of both parties.

By contrast, in the areas of new housing construction and mobility certificates, both types of remedial programs Judge Skinner was unwilling to impose on HUD, plaintiffs found they were in a precarious bargaining position. They were therefore only able to create vague commitments without operational definition in the Consent Decree, effectively leaving all implementation discretion to HUD and the BHA. Without the appointment of a Special Master to superintend implementation of the Decree or the establishment of any reasonably expedited process for enforcement, the NAACP found itself without legal recourse to constrain the wide discretion left HUD and the BHA in the Decree when their actions fell short of achieving the substantive integrative goals embodied in the Decree.

Many of the same limits on effectiveness were present in the implementation of Metrolist. Although the Decree's requirements for implementing the apartment listing service

were more specific than the general terms attached to the project-based and mobility certificate programs, the plaintiffs still faced difficulty in achieving the substantive goals of the program. Crucially, just as with the certificate requirements, the lack of enforcement mechanisms rendered the NAACP unable to force the defendants to change practices that may have met the letter of the Consent Decree but did little to address the underlying harm. Where programs require affirmative implementation choices, some continuing mechanism for either monitoring their effectiveness or providing incentives for defendants to achieve substantive successes, is an essential part of any adequate remedy.