Causation of Public Housing Segregation: HUD Authorization of Applicant Choice in Tenant Selection and Assignment Plans

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CAUSATION OF PUBLIC HOUSING SEGREGATION: HUD AUTHORIZATION OF APPLICANT CHOICE IN TENANT SELECTION AND ASSIGNMENT PLANS

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I. INTRODUCTION

Approximately ten million Americans today live in some 60,000 housing developments¹ subsidized by the U.S. Department of Housing and Urban Development (HUD). HUD administers four major subsidy programs: conventional family projects, elderly projects, privately owned developments with rent supplements and/or mortgage subsidies, and privately owned "Section 8" housing.² The evi-

¹ Flournoy & Rodrigue, Separate and Unequal: Illegal Segregation Pervades Nation's Subsidized Housing, Dallas Morning News, Feb. 10, 1985, at 1A, col. 1 [hereinafter Flournoy & Rodrigue, Separate and Unequal]. The authors published this article as part of a week-long series on public housing segregation, drawing on thousands of HUD documents obtained through Freedom of Information Act requests.

² From 1937 to 1964 the federal government funded the construction of 540,000 subsidized apartments, principally conventional family projects. From 1964 to 1984, public housing authorities built with federal funds over 3.3 million new units, including 750,000 units in conventional housing projects, approximately 830,000 rental/mortgage subsidy units
dence of racial segregation and inequality in these programs is overwhelming. Since 1962, when eighty percent of federally supported developments were completely segregated, little has changed. For example, the latest available data indicate that seventy-one percent of African-American public housing tenants live in developments over eighty-five percent African-American in composition.

Government agency decisions at the local and federal levels have created or contributed to this racial separation. Local public housing authorities (PHAs) have disproportionately placed whites in the newer developments, in particular elderly housing, often located in the suburbs. This practice has confined minorities to the oldest public housing stock, the conventional family projects built in the central cities. PHAs have also fostered segregation through

and 1.7 million Section 8 units. The Section 8 housing project program terminated in 1974 but HUD continues to honor the subsidy contracts existing at that time. Id. at 25A, col. 1.


4 Flournoy & Rodrigue, Fair Housing Failure: 5 Administrations Have Refused to Enforce Anti-discrimination Laws, Dallas Morning News, Feb. 15, 1985, at 16A, col. 1 [hereinafter Flournoy & Rodrigue, Fair Housing Failure]. HUD survey data from 1977 indicate that 41% of white households lived in “racially identifiable” projects, that is, over 85% white. In another study, 80% of the projects varied at least 15% from the overall racial mix of the public housing authority. Id. Examples from the cases paint an equally stark picture. In East Texas a federal court found that of 219 projects examined, 199 were over 75% one race, including 121 100% segregated. Young v. Pierce, 628 F. Supp. 1037, 1044 (E.D. Tex. 1985), aff’d, 822 F.2d 1576 (5th Cir. 1987). In Philadelphia, a court found that of 50 projects, 40 were over 65% African-American and 6 were over 90% white. Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1007–08 (E.D. Pa. 1976), aff’d in part, rev’d in part, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). In Boston, a Boston Housing Authority study found that of 61 projects, 33 were “extremely imbalanced,” being over 90% of one race, compared to a roughly 50-50 racial mix for the total public housing population. Mooney, Wide Imbalance Found at 33 Projects, Boston Globe, Feb. 19, 1988, at 1, col. 1 [hereinafter Mooney].

5 Flournoy & Rodrigue, Separate and Unequal, supra note 1, at 24A, col. 1, 25A, col. 1, 26A, col. 1. For example, of the 580,000 Section 8 apartments constructed between 1975 to 1984, whites now occupy 85% of these units, and the elderly occupy 71%. The latest HUD data show that two-thirds of all elderly units are white-occupied. Id. at 25A, col. 5. PHAs have clearly slanted public housing construction towards the elderly. In 1964 the elderly occupied 26% of all federally supported apartments. In 1984 they occupied 53% of all units built since 1964, including 51% of all Section 8 units, while consisting of only 23% of the population eligible for Section 8. Id. As an example of segregation by program, in 36 counties in East Texas, 76% of Section 8 new construction units went to whites, while 77% of rent/mortgage supplement apartments went to African-Americans. Young v. Pierce, 628 F. Supp. at 1044. This close correlation between racial occupancy and type of program is not coincidental. In setting construction priorities overwhelmingly in favor of Section 8 elderly housing, PHAs knew that, compared to white applicants for subsidized housing, the demand from African-American applicants was disproportionately greater for family housing. Flournoy & Rodrigue, Separate and Unequal, supra note 1, at 25A, col. 1, 26A, col. 1.

6 Flournoy & Rodrigue, Separate and Unequal, supra note 1, at 25A–26A.
the construction of public housing in racially identifiable neighborhoods.\(^7\) The PHAs have then selected and assigned tenants so as to perpetuate the existing racial segregation of the surrounding community.\(^8\) Virtually all PHAs provide inferior services and lower capital expenditures for predominantly minority developments.\(^9\) Urban housing shortages, rising rents, and pervasive private housing discrimination\(^10\) have sharply limited the choices of low-income minority renters,\(^11\) forcing them to accept discriminatory, substandard living conditions in public housing.

HUD is complicit in this system of public housing segregation through its financial support and its failure to pursue adequate remedies. For example, every year HUD reviews approximately eighty of the nation’s 3,000 PHAs\(^12\) to determine their compliance with Title VI of the Civil Rights Act of 1964.\(^13\) At this pace, HUD would need thirty-seven years to review all PHAs. More important, HUD’s compliance reviews do not actually remedy segregation. For example, fourteen years after HUD’s 1974 compliance review and settlement agreement with the Boston Housing Authority, well over half of public housing in Boston remained segregated.\(^14\) Nationally, HUD has never even surveyed all federally subsidized housing to determine the extent of segregation.\(^15\) In the words of a HUD consultant, the agency is “deeply involved in the creation of the ghetto system, and it has never committed itself to any remedial action.”\(^16\)

\(^7\) Id. at 25A, col. 1.
\(^9\) Federal studies have documented a significant disparity of services between (mostly minority) family projects versus (mostly white) elderly ones. A 1979 report on 1,500 projects found that 92% of the “bad” or “very bad” condition projects were family ones, “old, large, located in urban areas . . . .” Flournoy & Rodrigue, *Separate and Unequal*, supra note 1, at 26A, col. 1. PHAs consciously neglected the family projects as whites moved out and they became predominantly minority-occupied. Id. The general counsel of HUD acknowledged in 1985 that mostly minority projects have worse physical conditions, fewer amenities, and fewer social services. Id. at 24A, col. 1.
\(^11\) For example, the First Circuit Court of Appeals has found that the lack of safe, desegregated housing in white areas of Boston curtails African-American citizens’ housing opportunities. NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 151 (1987).
\(^12\) *Voluntary Desegregation Options Part of New Compliance Program Offered to PHAs*, 16 Hous. & Dev. Rep. (WGL) 343, 344 (1988).
\(^14\) Mooney, supra note 4, at 1.
\(^16\) Id. at 24A, col. 1.
This Note analyzes the potential liability of HUD for illegally causing the segregation of federally supported public housing by authorizing public housing applicants to choose among possible projects. While the Supreme Court in the 1968 case of Green v. County School Board\textsuperscript{17} essentially forbade similar choice policies in the context of public school desegregation,\textsuperscript{18} the courts have failed to check segregation through individual choice in the public housing field. Despite this judicial inaction, there is a strong possibility that HUD's policies allowing applicant choice make the agency liable for deliberately maintaining a national system of segregation in public housing.

In exploring this thesis, this Note focuses on the issue of causation in a hypothetical national class action suit brought by public housing tenants and eligible applicants (plaintiffs) against HUD.\textsuperscript{19} As a simplification, the hypothetical class action covers only HUD's regulation of PHAs. Much of the analysis, however, also applies to HUD's relationship with private owners of federally subsidized housing.\textsuperscript{20} The plaintiffs allege that HUD caused and continues to cause public housing segregation by authorizing tenant selection and assignment plans (TSAPs) which allow individuals applying for subsidized housing to choose the location of their public housing residence. Proof of such causation would satisfy the chief element of a cause of action under Title VIII of the Civil Rights Act of 1968.\textsuperscript{21} It would fulfill one element of a complaint brought under Title VI of the Civil Rights Act of 1964 and the fourteenth amendment to the U.S. Constitution.\textsuperscript{22}

Initially, the analysis traces a history of public housing segregation, federal policy allowing individual choice in assigning tenants to apartments, and litigation over this policy. Because Title VIII, also known as the Fair Housing Act of 1968, provides for a causation analysis similar to Title VI's, HUD's special duties and liabilities under both Title VI and Title VIII are discussed. Although HUD

\textsuperscript{17} 391 U.S. 430.

\textsuperscript{18} Id. at 440–41.

\textsuperscript{19} Such a class action suit is possible. See Underwood v. Hills, 414 F. Supp. 526, 528, 531 (D.D.C. 1976), aff'd, 429 U.S. 892 (1976) (national class of public housing tenants successfully sued HUD to enforce mandatory payment of operating subsidies).

\textsuperscript{20} See infra notes 37, 68, 119, 176–98 and accompanying text.


\textsuperscript{22} A subsequent article will discuss whether HUD intentionally segregated public housing through applicant choice TSAPs. Such intent would complete the essential elements of a cause of action under Title VI or the fourteenth amendment's equal protection clause.
has important defenses, the stronger, more persuasive legal theories support plaintiffs' arguments that HUD has implemented policies of individual applicant choice so as to cause public housing segregation. Throughout this analysis, competing judicial philosophies about civil rights law underlay the legal issue of the appropriate standard of causation in determining HUD's liability for segregation maintenance.

II. PUBLIC HOUSING SEGREGATION, TENANT SELECTION PLANS AND APPLICANT CHOICE

A. Desegregation Litigation and Tenant Selection and Assignment Plans

HUD must approve all PHAs' tenant selection and assignment plans (TSAPs). These are the formal regulations for accepting and reviewing applications for public housing, setting eligibility criteria such as income levels, establishing any special preferences, selecting qualified applicants, and designating apartments for them to occupy.\(^{23}\) TSAPs can also provide for transfers of existing tenants to new apartments.\(^{24}\) Where a TSAP channels applicants to projects so as to create or maintain segregation, HUD has arguably authorized such discrimination. Over the past fifteen years, minority plaintiffs in a small number of cases have successfully sued HUD for sanctioning illegal racial discrimination by PHAs.\(^{25}\) These cases litigated in some depth the issues associated with discriminatory site selection of housing projects,\(^{26}\) but failed to examine closely the process by which PHAs selected tenants for apartments from the applicant pools and then assigned them to units.

This failure to examine discriminatory TSAPs is one reason that nominally successful desegregation suits (i.e., where the plain-

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\(^{26}\) Illegal site selection focuses on whether it is discriminatory to build projects only in minority areas. E.g., United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987). Site selection cases can also turn on whether cross-district remedies are appropriate. E.g., Gautreaux, 425 U.S. 284.
tiffs prevailed) have not desegregated public housing. For example, *Resident Advisory Board v. Rizzo*\(^{27}\) centered on the efforts of the mayor of Philadelphia, other local elected officials, and HUD representatives to obstruct the construction of one housing project in a white area. The U.S. District Court for Eastern Pennsylvania found not only that this opposition was racially motivated, but also that the Philadelphia Housing Authority’s TSAP caused segregation citywide.\(^{28}\) Accordingly, the district court ordered a citywide remedial TSAP as well as the construction of the disputed project.\(^{29}\) On review, however, the Third Circuit Court of Appeals voided the remedial TSAP and required only the construction of the challenged project.\(^{30}\)

A careful reading of the district court opinion suggests that the TSAP issue was secondary to the plaintiffs’ case in *Rizzo*. The opinion does not reveal what the challenged TSAP required, apart from some type of applicant choice.\(^{31}\) The plaintiffs did not marshal sufficient evidence and arguments on appeal to prove that the TSAP caused segregation. The district court’s recognition of the logical connection of the TSAP to citywide segregation, however, is a signal to future plaintiffs to pursue this strategy more forcefully.

The constitutional infirmities of site selection theories have also undermined plaintiffs’ cases. Courts have refused to order the expenditure of funds to construct new housing developments because this remedy would have violated the constitutional separation of powers. For example, in an Eighth Circuit case, *Vann v. Housing Authority of Kansas City, Missouri*,\(^{32}\) the U.S. District Court for Western Missouri dismissed the plaintiffs’ complaint against HUD because an order forcing the PHA to build housing projects would have exceeded judicial authority over the executive branch.\(^{33}\) *Vann* also found that in the absence of congressional appropriation of funds, judicially-ordered construction of new projects impermissibly

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\(^{27}\) 425 F. Supp. 987, aff’d in part, rev’d in part, 564 F.2d 126.

\(^{28}\) 425 F. Supp. at 987, 1020, 1025.

\(^{29}\) Id. at 1028.

\(^{30}\) 564 F.2d at 152–53.

\(^{31}\) 425 F. Supp. at 1007–08, 1020, 564 F.2d at 139–40.

\(^{32}\) 87 F.R.D. 642 (W.D. Mo. 1980).

intruded into the legislative sphere. In *Jenkins v. State of Missouri*, the Eighth Circuit, in deciding a case combining school and housing segregation issues, refused to reach the issue of HUD's liability on grounds of federalism. The appellate court, agreeing with the U.S. District Court for Western Missouri, reasoned that since the local defendants administered the public housing program, their discrimination presumptively superseded any discrimination by HUD.

A class action challenge, either local or national, to HUD's authorization of discriminatory TSAPs could succeed in ameliorating public housing segregation where previous efforts have failed. Several considerations justify this proposition. Remedies focusing on site selection do not necessarily affect TSAPs, and so the process of sorting out tenants by race and assigning them to segregated developments may continue. Even if non-discriminatory siting of newly constructed projects achieves desegregation, this would affect only new tenants, leaving the remaining ten million residents of subsidized public housing locked into a segregated system. By contrast, remedial federal TSAP regulations could require tenant transfers and assignments of new tenants so as to achieve sweeping integrative effects.

One possible limit on the remedial potential of a national class action suit focusing on choice TSAPs is the extent to which PHAs have utilized applicant choice. There is apparently no hard data proving widespread use of choice TSAPs. However, since virtually all the reported public housing segregation cases involve a choice TSAP at some point in each PHA's history, there is a strong presumption of widespread use.

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34 87 F.R.D. at 668 (U.S. CONST. art. I, § 9, cl. 7 forbids judicially ordered housing construction where there has been no appropriation by Congress); see also NAACP, Boston Chapter v. Kemp, No. 78-850-S, slip op. at 14 (D. Mass. June 23, 1989).
36 Id. at 1498–99, 807 F.2d at 661.
37 See, e.g., *Young v. Pierce*, 685 F. Supp. 975, 981 (E.D. Tex. 1988) (judge ordered one waiting list for vacancies in all conventional family developments, elderly, section 8, and rent/mortgage supplement programs, and authorized group transfers of tenants for integration).
A TSAP-focused suit would also seek a remedy that is much less costly and thereby less intrusive on the powers of the legislature and executive than housing construction. A judicial order that HUD revise its TSAP policy would thus pose relatively little danger of violating the separation of powers among the three branches of government.\textsuperscript{39} Finally, no federalism problem would exist, since the remedy would cover only HUD.\textsuperscript{40} Significantly, in two of the most important public housing desegregation victories over the last twenty years, \textit{Young v. Pierce}\textsuperscript{41} and \textit{Hills v. Gautreaux},\textsuperscript{42} HUD was the sole defendant at the time of judgment. In cases such as these, that addressed TSAP mechanisms of discrimination and pursued remedies against HUD rather than against local governments or PHAs, plaintiffs have successfully effected desegregation. For example, in \textit{Gautreaux}, minority residents of Chicago’s public housing system forced HUD to require suburban PHAs to construct developments, funded by HUD, with apartments available to minority Chicago applicants.\textsuperscript{43} While commentators have presented \textit{Gautreaux} as essentially a siting controversy,\textsuperscript{44} the key to integrating the new proj-

\textsuperscript{39} See NAACP, Boston Chapter v. Kemp, No. 78-850-S, slip op. at 18–19 (D. Mass. June 23, 1989) (while acknowledging First Circuit Court of Appeals’ recognition of broad judicial authority to compel HUD to issue revised fair housing regulations and guidelines, trial judge on remand declined “to add to the existing mountain of federal rules and regulations”).

\textsuperscript{40} “An order directed solely to HUD would not force unwilling localities to apply for assistance . . . .” \textit{Jaimes v. Toledo Metro. Hous. Auth.}, 758 F.2d at 1098–99 (citing Hills v. Gautreaux, 425 U.S. 284, 303 (1976)), \textit{aff’d in part, rev’d in part}, 833 F.2d 1203 (6th Cir. 1987); see also \textit{Kemp}, No. 78-850-S, slip op. at 15–17.

\textsuperscript{41} 544 F. Supp. 1010 (E.D. Tex. 1982), \textit{aff’d}, 822 F.2d 1368 (5th Cir. 1987).

\textsuperscript{42} 425 U.S. 284, 286, 292 (1976).

\textsuperscript{43} Id. at 302–06.

\textsuperscript{44} E.g., \textit{Days, School Desegregation Law in the 1980’s: Why Isn’t Anybody Laughing?} (book review), 95 \textit{Yale L.J.} 1737, 1754 (1986) [hereinafter \textit{Days, School Desegregation Law}] (the author was Chief of the Civil Rights Division of the U.S. Department of Justice in the Carter
ects was the court-ordered assignment of minority applicants. Without this remedial TSAP, the suburban PHAs could have easily constructed subsidized elderly housing and selected a virtually all-white tenant population.

B. A Brief History of Federal Tenant Selection and Assignment Policy

This Note proposes that HUD causes public housing segregation by authorizing applicant choice in local TSAPs. Thus, TSAPs are not only crucial to fashioning effective remedies, as in Gautreaux, but also for proving HUD's underlying liability for causing segregation. The following short history of public housing reveals a close association between choice TSAPs and the persistence of public housing segregation.45

Congress initiated the conventional public housing project system with the Housing Act of 1937.46 This legislation created a national policy of providing low-rent housing to meet the needs of low-income citizens unable to obtain decent housing in the private market. At the same time Congress created the U.S. Housing Authority to implement the Housing Act.47 Congress gave the Housing Authority limited powers and duties, leaving housing policy largely to local government.48 In 1947 the U.S. Housing Authority became the Public Housing Administration, part of the Housing and Home Finance Agency.49

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45 “Applicant choice” and “choice TSAP” in this Note refer to any TSAP allowing applicants for public housing a choice among two or more housing developments. Plan B is HUD's name for the principal form of a choice TSAP, allowing each applicant three opportunities to accept or refuse an offer of housing. PHAs may adopt a hybrid of Plan B with a special preference for any applicant choosing to live in a project predominantly of another race [hereinafter desegregation preference TSAP]. An applicant exercising this choice can receive housing before other applicants with longer tenure on a chronologically ordered waiting list. A third form of choice TSAP allows applicants to choose projects at the time of initial application, by listing preferences, usually up to three [hereinafter freedom of choice TSAP]. The PHA then places the applicant on a separate waiting list for each of the preferred projects. A fourth form of choice TSAP allows voluntary transfers of existing tenants to achieve desegregation [hereinafter voluntary transfer TSAP].


From 1937 to 1962 federal TSAP policy was one of "separate but equal."50 The Public Housing Administration authorized this policy of de jure segregation in its Low-Rent Housing Manual.51 Although the Housing Act of 1949 called for integration of public housing as a goal of federal policy,52 there is no indication the Public Housing Administration ever issued regulations or took any action to further this statutory policy. On the contrary, its Low-Rent Housing Manual continued to authorize de jure segregation into the 1950s.53

President Kennedy in 1962 issued Executive Order 11,063 forbidding discrimination on the basis of race, color, religion, or national origin in the sale or rental of residential property owned or operated by the federal government or with federal financial assistance.54 In interpreting the Executive Order, the government exempted projects covered by existing contracts.55 The Public Housing Administration did not litigate a single case to enforce Executive Order 11,063. The agency ignored PHAs' widespread policy of siting new housing projects in racially identifiable neighborhoods and then assigning tenants to match the neighborhood racially. Apparently a formal disavowal of separate but equal satisfied the Public Housing Administration.56 Not surprisingly, there is no evidence of any public housing desegregation before 1964.57

51 The Public Housing Administration Housing Manual, § 102.1, Feb. 21, 1951, stated:

The following general statement of racial policy shall be applicable to all low-rent housing projects developed and operated under the Housing Act of 1937, as amended.

I. Programs for the development of low-rent housing in order to be eligible for [Public Housing Administration] assistance, must reflect equitable provision for eligible families of all races determined on the approximate volume of their respective needs for such housing.

Heyward, 238 F.2d at 697 (emphasis added). "Equitable provision" meant a separate but equal policy. Id.

Guidelines such as this Housing Manual are presumed to be official federal policy "unless plainly erroneous or inconsistent with the [authorizing] regulation." Arthur v. Starrett City Associates, 89 F.R.D. 542, 547 (D.C.N.Y. 1981) (letter from HUD's Executive Assistant to the Secretary represents official policy).
53 Heyward, 238 F.2d at 697.
56 Comment, The Public Housing Administration, supra note 47, at 878–79.
57 Young v. Pierce, 628 F. Supp. at 1045.
Title VI of the Civil Rights Act of 1964 forbade any federal funding of government programs that discriminated on the basis of race. In response to Title VI, the Public Housing Administration for the first time ordered PHAs to submit TSAPs for federal approval. At this same time, new federal regulations required PHAs to acknowledge their past intentional discrimination. The Public Housing Administration also encouraged PHAs to adopt "freedom of choice" TSAPs. Freedom of choice allowed applicants to choose a project or to list preferred projects upon application. The PHAs then kept separate waiting lists for each project. By incorporating freedom of choice in its Low-Rent Housing Handbook, successor to the Low-Rent Housing Manual, the Public Housing Administration in 1964 explicitly authorized applicant choice for the first time.

Although apparently superseded in 1967 by new regulations, freedom of choice remained in HUD's Low-Rent Housing Handbook until 1969. This time lag demonstrated great bureaucratic inertia and/or the essential unity, in HUD's view, of the old and new regulations. In either case, Green v. County School Board, decided in 1968, made the removal of freedom of choice inevitable. Green clearly indicated that, in the context of desegregation of public schools, the existence of more effective means of desegregation made freedom of choice policies unacceptable under the Constitution. For example, the alternative means of desegregation in Green included redrawing school districts and consolidation of schools. Federal housing officials could not have missed the implications of Green for their own desegregation policies.

59 Comment, The Public Housing Administration, supra note 47, at 881-82.
60 Id. The distribution of Form PHA-3037 containing these directives constituted the Public Housing Administration's only response to Title VI from 1964-1967. Young, 628 F. Supp. at 1045.
61 Comment, The Public Housing Administration, supra note 47, at 881-82. Formal adoption of a freedom of choice policy met the Public Housing Administration's standards for compliance with Title VI. Id.
63 Many PHAs continued to keep separate waiting lists for each project, characteristic of freedom of choice, with HUD approval. E.g., Compliance Agreement Between the U.S. Dep't of Hous. and Urban Dev. and the Boston Hous. Auth., Boston, Mass., Case No. 01-75-05-015-350 6-7 (Nov. 3, 1976).
64 391 U.S. 430.
65 Id. at 439-41.
66 Id. at 442 n.6.
In recognition of the importance of federal housing policy, Congress created HUD in 1965. In 1967, HUD adopted its first TSAP regulations and guidelines and authorized a new form of applicant choice. In 24 C.F.R. § 1.4(b)(2)(ii), the agency required HUD approval of all local TSAPs and further mandated:

A recipient [a PHA or a private development owner] . . . shall assign eligible applicants to dwelling units . . . on a community-wide basis [i.e., using one waiting list] in sequence based upon the date and time the application is received, the size or type of unit suitable, and factors affecting preference or priority established by the recipient’s regulations, which are not inconsistent with the objectives of Title VI of the Civil Rights Act of 1964 and this Part I. The plan may allow an applicant to refuse a tendered vacancy for good cause without losing his standing on the list but shall limit the number of refusals without cause as prescribed by the responsible Department official.

With this new regulation, HUD reaffirmed the principle of applicant choice without using the suspect description, freedom of choice.

In July, 1967, HUD adopted guidelines authorizing two alternative TSAPs. Under “Plan A,” a PHA could make one offer to each applicant when she reached the top of the waiting list; a refusal would place the applicant at the bottom of the list. Under “Plan B,” the PHA would make one offer of a suitable vacancy from the project with the largest number of vacancies. If the applicant refused, the PHA would offer a vacancy from the project with the second highest number of vacancies. If the applicant refused, the PHA would offer a vacancy from the development with the third highest number of vacancies. Upon a third refusal, the applicant would go to the bottom of the waiting list. To adopt another type of TSAP, a PHA had to obtain HUD approval. Although Congress knew of Plan B in 1967 when it began consideration of Title VIII, Congress at that time did not endorse this policy. Congress has never debated Plan B or any other type of applicant choice TSAP. In 1981, however, the Senate rejected Senator Orrin Hatch's at-
tempt to weaken Title VIII with a law emphasizing free choice for citizens seeking public and private housing. 71

HUD officials in 1969 realized that the agency's TSAP policy had failed to produce any desegregated public housing. 72 The Department of Justice found in 1970 that "most public housing . . . (projects) were segregated and the tenant assignment and selection policy could be a contributing factor." 73 In 1972 the HUD General Counsel wrote that the TSAP policy is "difficult to enforce and of dubious value." 74 In 1977 a Department of Justice Civil Rights Division Interagency Survey found HUD's existing TSAP to be ineffective and recommended adoption of a new one "at the earliest opportunity." 75 HUD and the Department of Justice signed a memorandum of understanding in 1979 that HUD would take this step. Although HUD later improved other regulations to make them more effective, 76 HUD never honored the 1979 memorandum of understanding. 77 Plan B is still official HUD policy. 78 HUD continues to offer segregation remedies that rely on individual choice. 79

C. The Non-Litigation of Applicant Choice and Causation of Public Housing Segregation

One reason for the persistence of choice TSAP regulations and guidelines is the failure of civil rights plaintiffs to litigate choice policies thoroughly. No desegregation case has directly challenged the authorization of applicant choice in 24 C.F.R. § 1.4(b)(2)(ii)


73 Flournoy & Rodrigue, Fair Housing Failure, supra note 4, at 16A, col. 1.

74 Young, 628 F. Supp. at 1046.

75 Flournoy & Rodrigue, Fair Housing Failure, supra note 4, at 16A, col. 1.

76 For example, in 1972 HUD issued regulations under Title VIII to restrict the siting of projects in minority communities and to require affirmative marketing of all federally subsidized units. 24 C.F.R. §§ 200.600–40; Young, 628 F. Supp. at 1046.

77 Young v. Pierce, 628 F. Supp. 1037, 1047 (E.D. Tex. 1985); Flournoy & Rodrigue, Fair Housing Failure, supra note 4, at 16A.

78 Telephone interview with Joe Vera, Chief, Fair Housing Enforcement Branch, Fair Housing Equal Opportunity Office, Region I (New England), HUD (Oct. 18, 1989).

79 See, e.g., HUD, Justice Dep't Charges Georgia, Arkansas PHA's with Discrimination, 7 HOUS. & DEV. REP. (BNA) 422 (1979).
In a dozen cases challenging choice TSAPs, the courts divided. Neither the pro nor anti-choice line of decisions fully explored the possible causal connection between individual choice and segregation.  

Only one case presented conclusive proof that applicant choice caused segregation. In Middleboro Housing Authority v. Kentucky Commission on Civil Rights, a small city with a Plan B TSAP had three white projects and two African-American projects. The Kentucky Appeals Court found that this system "guaranteed" segregation because the white applicants knew that one of the three offers under Plan B would be for a white project. The white applicants refused all offers of vacancies in African-American projects. This fact pattern is unusual, the key being that fewer than three projects were identifiable as minority. Accordingly, Middleboro, despite its strong anti-choice holding, would probably not apply to most PHAs' choice TSAPs.

The remaining anti-choice cases failed to present clear-cut and convincing evidence justifying a conclusive holding that applicant choice actually caused segregation. Some courts have found that applicant choice directly caused segregation but the lack of persuasive analysis weakened this finding, suggesting that other factors were the actual cause. This occurred in Resident Advisory Board v. Rizzo, where the lower court asserted that the applicant choice TSAP in Philadelphia's housing system logically must have caused system-wide segregation. This failed to convince the Third Circuit Court of Appeals, which voided the remedial TSAP. In Young v. Pierce, by contrast, the Fifth Circuit Court of Appeals upheld the lower court's inference of a substantial causal connection between applicant choice and segregation without proof of "but for" causa-
tion, i.e., evidence that applicant choice alone would cause segregation.\textsuperscript{87} In Young, four of twenty-two PHAs in East Texas administered freedom of choice TSAPs. All twenty-two PHAs violated formal TSAP procedures.\textsuperscript{88} In contrast with Rizzo’s bare record, extensive evidence in Young showed that HUD knew of the widespread practice of skipping over minority applicants and assigning apartments to whites lower down on the waiting list (skipping). The plaintiffs in Young also showed that HUD’s regulations required it to authorize and supervise all PHA activities relating to fair housing, including all TSAP policies and practices. HUD was thus liable for all the possible causes.\textsuperscript{89} Accordingly, the U.S. District Court for Eastern Texas found that applicant choice was a substantial cause of segregation, although there was no evidence that it alone had caused segregation.\textsuperscript{90}

Application of a causation standard of substantial cause was critical to the plaintiffs’ victory in Young. Tort law defines substantial cause as one contributing to an event and not superseded by subsequent causes.\textsuperscript{91} A substantial cause does not rise to the level of a necessary element, an element “but for” which the event would not have occurred.\textsuperscript{92} A substantial cause is rather a partial cause, one of several major contributing factors to an event.\textsuperscript{93} Thus, in the absence of one substantial cause, other factors could produce the same event. A defendant nonetheless could still be liable based on the contribution of that one substantial cause factor.\textsuperscript{94} For example, in Young v. Pierce, HUD’s regulatory duties to approve and supervise the acts of PHAs provided such a sufficient connection. HUD’s approval of choice TSAPs was a substantial cause of segregation across thirty-six counties in East Texas, despite the PHAs’ skipping practices and widespread violations of the formal TSAPs.\textsuperscript{95}

\textsuperscript{87} 628 F. Supp. at 1046, 1051–56, 822 F.2d at 1372.  
\textsuperscript{88} 628 F. Supp. at 1048–51; cf. Jaimes v. Toledo Metro. Hous. Auth., 758 F.2d 1086, 1106, 1108 (6th Cir. 1985) (district court did “no analysis” of the causal relation of Plan B to segregation, but nonetheless Plan B contributed “at least in part”), aff’d in part, rev’d in part, 833 F.2d 1203, 1208 (6th Cir. 1987) (HUD liable under Title VI, Title VIII, and equal protection clause if “on notice” of PHA’s discriminatory practices).  
\textsuperscript{89} 544 F. Supp. 1010, 1015 (E.D. Tex. 1982), aff’d, 822 F.2d 1368 (5th Cir. 1987).  
\textsuperscript{90} 628 F. Supp. at 1046, 1051–56, 640 F. Supp. at 1482–83, 822 F.2d at 1372.  
\textsuperscript{93} See, e.g., Hamil, 481 Pa. at 266, 392 A.2d at 1285.  
\textsuperscript{94} See, e.g., Kingston v. Chicago & Northwestern Railway, 191 Wis. 610, 211 N.W. 913, 914 (1927).  
\textsuperscript{95} 628 F. Supp. 1037, 1045–46, 1051–54 (E.D. Tex. 1985), aff’d, 822 F.2d 1368, 1372.
Despite the extensive record and sweeping victory for plaintiffs in Young, the lack of proof that applicant choice alone would cause segregation undercuts the persuasive force of this case. Plaintiffs in other cases may have to make such a showing, because they cannot support inferences of causation with a Young fact pattern, i.e., many years of HUD's knowing acquiescence in a variety of discriminatory local policies.\(^{96}\) Also, courts looking for "but for" causation will have a ready-made hook on which to hang their dismissals.

The pro-choice line of decisions similarly begs a number of questions. In Vann v. Housing Authority of Kansas City, Missouri,\(^{97}\) the U.S. District Court for Western Missouri dismissed plaintiffs' challenge of applicant choice on standing grounds, ignoring extensive factual material supporting the cause of action.\(^{98}\) In another Eighth Circuit case, Jenkins v. State of Missouri,\(^{99}\) HUD won a dismissal on questionable legal grounds. Specifically, the U.S. District Court for Western Missouri found that HUD had no duty to enforce its non-discrimination regulations, despite substantial evidence and legal authority for such a duty.\(^{100}\) Thus, in two major victories for HUD, Eighth Circuit courts never reached the merits of the choice TSAP causation claim.

Courts have upheld choice TSAPs in cases where plaintiffs did not actually challenge applicant choice. For example, in Perez v. Boston Housing Authority,\(^{101}\) a tenants' class action suit concerning substandard living conditions, the trial judge raised the issue of segregation on his own motion.\(^{102}\) Although endorsing the Boston Housing Authority's desegregation preference TSAP, the Massa-

\(96\) 628 F. Supp. at 1051.
\(97\) 87 F.R.D. 642 (W.D. Mo. 1980).
\(98\) Id. at 649–51; see also Bell v. Board of Educ., Akron Pub. Schools, 491 F. Supp. 916, 945–48 (N.D. Ohio), aff'd, 683 F.2d 963 (6th Cir. 1982).
\(99\) 593 F. Supp. 1485 (W.D. Mo. 1984), overruled on other issues sub nom. Jenkins by Agyei v. Missouri, 807 F.2d 657 (8th Cir. 1986) (en banc).
\(100\) 807 F.2d at 692 n.10 (Arnold, J., dissenting).
\(101\) 379 Mass. 703, 400 N.E.2d 1231 (1980).
\(102\) M. McCleirght, Recent History of Fair Housing Issues at the Boston Housing Authority 2 (Mar. 3, 1980) (memorandum from Greater Boston Legal Services attorney to Boston Housing Authority tenant organizations) (available from author).
chusetts trial and appellate courts never litigated the legality of applicant choice.103

Finally, some courts have held that applicant choice is actually remedial, but have offered no evidence or analysis of why this is so.104 These cases suggested that where PHAs consistently failed to adhere to the formal policy of applicant choice and instead practiced skipping and other illegal practices, applicant choice deserved a chance to work.105 This reasoning implies that HUD approval of choice TSAPs presumptively demonstrates their effectiveness in desegregating public housing. The regulatory history of applicant choice clearly indicates that this rationale is wrong.

In a third set of cases challenging choice TSAPs, courts issued contradictory holdings. In the earliest case in which plaintiffs challenged applicant choice, Heyward v. Public Housing Administration,106 plaintiffs objected to a federal requirement that applicants state a preference for a specific housing project. The Fifth Circuit Court of Appeals agreed with plaintiffs that because all the projects were segregated, applicants had to make a racial choice in violation of the fourteenth amendment's due process clause.107 Although recognizing a valid cause of action against this freedom of choice TSAP, the Fifth Circuit declined to reach a decision on the challenge. Instead the court granted dismissal on standing, since plaintiffs were not tenants or applicants.108 Heyward could support the proposition that requiring applicants to choose among racially classified projects is impermissible. This is very different from a finding that applicant choice created those classifications in the first place.


106 238 F.2d 689 (5th Cir. 1956).

107 Id. at 696–97.

108 Id. at 698.
Some courts have held for plaintiffs but on grounds other than plaintiffs' challenge of a choice TSAP. For example, *Pennsylvania Human Relations Commission v. Chester Housing Authority* did not reach the issue of the choice TSAP's causation of segregation. Instead, the Pennsylvania Supreme Court found that the PHA caused segregation by the practice of skipping. The court did not examine or decide the actual effect of applicant choice on occupancy patterns.

III. Plaintiffs' Theories Of Causation

Ultimately *Heyward* and *Chester* have a great deal in common with the more explicitly pro and anti-choice cases. None of these cases explained the actual causal relationship of choice to segregation. A judicial determination of this causal relationship, however, is quite possible. Title VI and Title VIII set out a standard of causation which plaintiffs could meet by establishing an inference of substantial causation.

A. The Standard of Causation Under Title VI

Title VI of the Civil Rights Act of 1964 provides: “No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.” The Supreme Court has recognized an implied private right of action under Title VI. In bringing such a cause of action against HUD, the plaintiffs must prove that HUD is involved in a federally subsidized activity, that HUD's actions actually caused discrimination, and that HUD intended to discriminate. Thus, plaintiffs must prove causation by showing that HUD's authorization of applicant choice TSAPs was a federally subsidized activity and that applicant choice caused segregation.
The words "any program or activity receiving federal assistance" refer not only to PHAs' activity of providing public housing but also to HUD's actions in funding and regulating PHAs. Accordingly, courts have held that HUD regulations are within the scope of Title VI, and are willing to override HUD procedures when they are clearly inadequate. Thus, plaintiffs can meet the first element of a Title VI cause of action against HUD, since HUD's TSAP regulations clearly involve a federally subsidized activity.

Actual causation of segregation is the second element of a Title VI cause of action. As a threshold question, plaintiffs must show that the discriminatory effect that Title VI forbids could include public housing segregation. Title VI's legislative history, HUD's regulations, and the case law indicate that "subjected to discrimination" includes federally supported public housing segregation.

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114 Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.


117 24 C.F.R. § 1.4(b)(1) (1985) states that no recipient of federal aid may on the basis of race:

(i) Deny a person any housing, accommodations, facilities, services, financial aid or other benefits ... ;

(ii) Provide any housing, accommodations, facilities, services, financial aid or other benefits to a person which are different, or are provided in a different manner from those provided to others under the program ... ;

(iii) Subject a person to segregation or separate treatment in any manner related to his receipt of housing, accommodations, facilities, services, financial aid or other benefits under the program or activity;

(iv) Restrict a person in any way in access to such housing ... benefits ... .


119 Title VI regulations also cover privately owned federally subsidized housing. When a PHA channels federal funds to private owners under the Section 8 program, it must submit
Turning to the basic question of cause and effect, the plaintiffs must show by a "preponderance of the evidence"\textsuperscript{120} that applicant choice causes segregation. It is easy to prove the existence of segregation; in fact HUD concedes this.\textsuperscript{121} It is more difficult to prove that HUD-authorized choice TSAPs cause this segregation. The basic principles of causation elaborated in school and housing desegregation cases provide a starting point.\textsuperscript{122} These well-established principles justify the Fifth and Sixth Circuits' use of a substantial cause standard.

Inferences of causation would be unnecessary if direct evidence were available, as in \textit{Brown v. Board of Education.}\textsuperscript{123} In \textit{Brown}, the defendant school board admitted that it caused the school system to be segregated by race.\textsuperscript{124} Hence, plaintiffs had no problem of apportioning liability among multiple defendants nor a problem of determining which of several factors associated with one defendant were the actual cause or causes.\textsuperscript{125} Clearly, but for the actions of the Topeka Board of Education, school segregation would not have occurred. A substantial cause standard, therefore, was unnecessary.


\textsuperscript{120} S. Tucker, Memorandum on Nondiscrimination in Federally Assisted Service Delivery 5 (June 1980) (communication of Title VI compliance review policies from Assistant Director, HUD Fair Housing Equal Opportunity Office (FHEO), to all FHEO Regional Directors, Compliance Division Directors and Area Office Directors) [hereinafter Tucker, Memorandum on Nondiscrimination].

\textsuperscript{121} \textit{See} \textit{Flournoy} & Rodrigue, \textit{Separate and Unequal}, supra note 1, at 24A; Comment, \textit{The Public Housing Administration}, supra note 47, at 871 n.4.

\textsuperscript{122} The standard of causation under the equal protection clause, commonly used in desegregation cases, is identical to that required by Title VI. University of Calif. Regents v. Bakke, 438 U.S. 265, 287 (Powell, J.), 328 (Brennan, White, Marshall and Blackmun, JJ., concurring) (1977).

\textsuperscript{123} 347 U.S. 485 (1954).

\textsuperscript{124} \textit{Id.} at 486 n.1.

\textsuperscript{125} Actually there were two defendants in \textit{Brown}, the state of Kansas and the Topeka school board. On the question of de jure segregation, the two were effectively one defendant, as liability turned on the constitutionality of a state law and the school board was simply an extension of the state implementing this law. If the Court had upheld de jure segregation, the school board alone could have been liable on the separate issue of providing unequal education. \textit{See} \textit{Brown v. Board of Educ.}, 98 F. Supp. 797, 797–98 (D. Kan. 1951).
In the modern context of public housing segregation, problems of multiple defendants and multiple causes exist. The typical public housing case involves numerous defendants: a PHA, HUD, local elected officials such as mayors, and agencies such as school boards or development planning boards. Even if the plaintiffs sue only one defendant, this defendant can argue that other parties' acts were the actual causes of segregation. Plaintiffs usually cannot show that but for one defendant's acts, no segregation would have occurred. The possible multiple causes further complicate the picture: HUD authorization of applicant choice, HUD approvals of project siting, PHA adoption of applicant choice, PHA deviations from the official TSAP, PHA decisions on project siting, and the local school boards' creation of racially identifiable schools which helps determine the racial identity of adjacent neighborhoods and housing projects. Plaintiffs typically cannot show that but for one causal factor, no segregation would have occurred. Desegregation cases have accordingly drawn on tort law solutions to cases involving multiple defendants and multiple cause fact patterns. Following are two theories derived from desegregation law which could support a finding of inferred causation against HUD.

1. Inferences of Substantial Cause

An inferred cause theory must first show that among multiple defendants, HUD's acts constitute a substantial cause. Certain factors could warrant an inference of substantial cause. Statistical evidence of a strong association between segregation and a defendant's policies, although not conclusive, could help justify such an inference. The existence of a segregated national system of public housing probably constitutes such a statistical association. Rarely will a statistical association by itself prove causation, absent proof of some causal mechanism.

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126 See generally Days, School Desegregation Law, supra note 44.

127 Any "statistical evidence of disparate effect of a rule or a practice on a protected minority is highly probative." Kushner, Fair Housing, supra note 71, at 75. Such evidence might include the total absence of minorities from a housing project, significant underrepresentation of minorities at a project, and expert testimony on the effects of a policy or practice. Id. at 75-77.

128 Wards Cove Packing Co., Inc. v. Antonio, ___U.S.____, 109 S. Ct. 2115, 2121 (1989) (in Title VII employment discrimination case, specific causal practice must be identified); see also Kushner, Fair Housing, supra note 71, at 76.
For example, HUD's standards of causation under Title VI require in addition to a disparate impact a showing that "such disparity was brought about through some action or inaction."129 Under its own policies, HUD's inaction could be a cause of segregation through a failure "to seek out and document the cause of the disparity."130 HUD's Title VI policies thus suggest that failure to cure the segregation resulting from its actions or inactions would make HUD strictly liable. These policies find a prima facie case of causation where any "exclusionary effect" exists, where services to a protected class are not "qualitatively equivalent" to services to whites, or where a defendant has not taken "affirmative steps" to "overcome the effects of discrimination."131

In Young v. Pierce, for example, once PHAs caused segregation by illegally assigning applicants to apartments on the basis of race and once HUD knew of the resulting racial disparity, HUD had a duty to seek out the causes of segregation and remedy them. HUD's failure to do so in Young became a major factor in maintaining segregation in the East Texas PHAs. This liability for inaction arises, however, only when a prior cause of segregation exists and is known to HUD. In Young, this was the PHAs' discrimination over many years.

In order to justify what is essentially a vicarious liability, courts have used equitable principles. For example, if evidence suggests that two or more defendants acted in concert, courts are more likely to find each defendant to be a substantial cause of an event. Logically, under tort law, whether defendants acted separately or together should be irrelevant to causation.132 In desegregation cases, however, the Supreme Court seems to apply narrower equitable principles out of fairness to defendants.

The Court distinguishes joint action and independent action, in the latter situation requiring "but for" causation for each act. For example, the U.S. District Court for Eastern Michigan in Milliken v. Bradley133 applied the standard modern tort law approach. This court found that suburban school districts' encouragement of white flight was a cause of school segregation in Detroit. Specifically, the court found that the suburban school districts' massive construction

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129 Tucker, Memorandum on Nondiscrimination, supra note 120, at 4–5.
130 Id. at 4.
131 Id. at 4 n.1.
132 Restatement (Second) of Torts §§ 875, 879 (1977).
programs of schools for all-white student bodies was a substantial cause by inviting, planning for, and inducing white flight.\textsuperscript{134} The Supreme Court, however, ruled that the Detroit defendants' acts had no "segregative effect" in the suburban districts and therefore that the suburban actors did not cause the white flight.\textsuperscript{135} This finding, apparently contrary to the facts,\textsuperscript{136} suggests that parties acting relatively independently of a primary defendant are less likely to be found a cause of segregation because a "but for" standard will apply. The Court's deference to government defendants in desegregation cases acting independently of a primary defendant, however, will not aid HUD. Since HUD and PHAs act in concert by regulatory mandate,\textsuperscript{137} the Supreme Court is more likely to apply a substantial cause standard to HUD's acts.

Another equitable principle justifying a substantial cause finding against HUD is the proposition that, relative to innocent plaintiffs, fairness dictates that defendants should have the burden of proving another cause superseded and negated the defendants' acts.\textsuperscript{138} This fairness rationale saved a weak causation argument in \textit{Jaimes v. Toledo Metropolitan Housing Authority},\textsuperscript{139} where HUD and a PHA were defendants. The Sixth Circuit Court of Appeals found that the U.S. District Court for Northern Ohio did "no analysis" of whether Plan B was a proximate cause of the plaintiffs' injuries. The trial court failed to establish "but for" causation, i.e., whether any alternative policy could have avoided the injury.\textsuperscript{140} Nonetheless, the Sixth Circuit found that where the racial imbalance was "attributable, at least in part to past practices of segregation . . . those responsible for tenant assignment and transfers may properly be ordered" to abandon Plan B and implement a special affirmative action TSAP.\textsuperscript{141} Thus, establishment of a substantial cause standard on equitable grounds may be crucial.

Once the plaintiffs establish that HUD's acts constitute a substantial cause of segregation, the court must decide whether it is

\textsuperscript{134} Dimond, \textit{Beyond Busing}, supra note 38, at 81–83. The author was an attorney for the plaintiffs in this case.
\textsuperscript{135} 418 U.S. 717, 745 (1974).
\textsuperscript{136} Dimond, \textit{Beyond Busing}, supra note 38, at 81–83.
\textsuperscript{139} 758 F.2d 1086 (6th Cir. 1985), aff'd in part, rev'd in part, 833 F.2d 1203 (6th Cir. 1987).
\textsuperscript{140} 758 F.2d at 1106.
\textsuperscript{141} Id. at 1108.
necessary to identify which of these acts are the actual cause or causes. The Fifth and Sixth Circuits’ anti-choice line of decisions suggests that the plaintiffs do not have to identify the actual mechanisms of segregation. For example, in *Young v. Pierce* the trial court found HUD liable for TSAP-caused segregation where alternative causes existed. The alternatives included authorization of TSAPs in thirty-six counties in East Texas and failure to ensure PHA compliance with the formal TSAPs. Only four of these TSAPs involved applicant choice. The existence of a direct causal link between HUD and the PHAs based on HUD’s regulatory duties justified the inference of causation against HUD without assigning each cause to a discrete increment of segregation.

Inferring substantial cause without identifying the mechanisms of causation departs significantly from earlier tort law, under which plaintiffs must attribute a specific wrongful act to each defendant. The modern trend of tort law allows an inference of substantial cause against one defendant even where it is impossible to tie each defendant to one of the possible causal acts. The Fifth and Sixth Circuits appeared to adopt this standard of broad liability for multiple defendants with multiple causes in their anti-choice cases. The Eighth Circuit apparently adopted a standard of “but for” causation based on more traditional tort law principles, requiring some proof of specific causal mechanisms in the housing segregation area.

Even the Sixth Circuit, in *Jaimes*, insisted on evidence that the injury was “fairly traceable” to the defendant. In addition, *Jaimes* required plaintiffs to show that any proposed remedy would cure the injuries. Only an explanation of the actual dynamics of segregation through applicant choice would provide a “traceable” connection. Only such an explanation would clarify what type of remedy would be effective, i.e., a TSAP which does not rely on individual choice to achieve desegregation. Despite advancing a fairly tough standard of causation for plaintiffs to meet, the Sixth Circuit in *Jaimes* did not reverse the lower court’s decision, although it stated that the plaintiffs failed to meet this standard. This contradictory decision probably resulted from a reluctance to over-

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143 Id. at 1048–50.
145 758 F.2d 1086.
146 Id. at 1093.
147 Id.
148 Id. at 1106, 1108.
2. A Presumption of Causation

A second theory allows for a presumption of causation throughout a system of government-supported activity once plaintiffs show a defendant caused segregation in one part of the system. The rationale for such an inference is that Brown v. Board of Education\textsuperscript{149} in 1954 imposed an ongoing affirmative duty on all levels of government to eradicate segregated public facilities.\textsuperscript{150} For example, when the minority plaintiffs in Dayton Board of Education v. Brinkman\textsuperscript{151} proved causation of school segregation in one geographic area of the Dayton school system, a presumption arose of causation throughout the system, since the original duty extended across the system.\textsuperscript{152} The defendant school board then had the burden of proof in showing intervening parties' acts prevented defendant from meeting this duty.\textsuperscript{153} Applying this theory to HUD, if plaintiffs could show that applicant choice caused segregation of one project, a court could presume causation through the PHA's system, since the Brown-mandated duty extended across this system. By proving causation in one or more PHA systems, plaintiffs could expand this theory to support a presumption of causation across all federally supported public housing programs.

To summarize, it is consistent with modern tort principles to find that HUD's authorization of choice TSAPs and its violation of regulatory duties to supervise the actions of PHAs constitute a substantial cause of segregation. The Fifth and Sixth Circuits' theories of causation under a Title VI analysis, following evolving tort law, do not require an explanation of the actual process of segregation. This presents two problems. Plaintiffs cannot propose effective remedies if the causal mechanisms are poorly understood. Also, courts adopting the Eighth Circuit standard of "but for" causation will not accept evidence merely suggesting that a choice TSAP was a partial cause of segregation. Such courts will demand proof that "but for" applicant choice, segregation would not have oc-

\textsuperscript{149} 347 U.S. 483 (1954).


\textsuperscript{151} Id. at 526.

\textsuperscript{152} Id. at 535–38, 541.

\textsuperscript{153} Id. at 537; see Days, School Desegregation Law, supra note 44, at 1750 (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979)).
curred. The special duties imposed on HUD by Title VIII and an analysis of the social forces shaping applicant choice could help plaintiffs satisfy this more demanding approach.

B. The Standard of Causation Under Title VIII

Title VI requires that HUD not fund any activity which discriminates against racial minorities. In interpreting this obligation, the Fifth and Sixth Circuits have held HUD to a duty to monitor HUD-authorized TSAPs and to replace TSAPs that produce segregation. HUD's failure to replace applicant choice TSAPs arguably breaches this duty and causes segregation. Title VIII, known as the Fair Housing Act of 1968, codifies this court-created duty and places more demanding obligations on HUD. While passive supervision of PHAs may not violate a Title VI duty, it clearly violates Title VIII's more affirmative obligations. Thus, Title VIII greatly aids plaintiffs in proving substantial cause or "but for" cause.

Title VIII is more than an alternative cause of action to Title VI. Courts that have applied the two statutes together use only one standard of causation. The two are effectively pari materia regarding causation. Thus, Title VIII is a "super-amendment" to Title VI.

Title VIII's essential goal is to provide fair housing throughout the United States. The legislative history indicates that Congress desired immediate results in achieving integrated patterns of housing. Congress believed that actual integration was necessary to achieve the goals of aiding minorities trapped in ghettos and of educating whites insulated from any contact with minorities. Congress indicated that Title VIII was strong remedial legislation by

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155 See, e.g., NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987); Clients’ Council v. Pierce, 711 F.2d 1406, 1425 (8th Cir. 1983).
allowing recovery of damages (unlike Title VI), permitting liability with no proof of intent, and mandating actual desegregation, not merely neutral processes. Clearly, Congress considered “fair housing” to mean actual desegregation.

Title VIII imposes a variety of obligations on HUD aimed at achieving actual integration. It requires HUD to investigate the effects of its programs, to monitor PHAs for the impact of local TSAPs and other policies, to “administer . . . affirmatively” these programs, and to know the workings of discrimination in local housing markets. Along with these statutory provisions, the legislative history supports judicial findings of a strict duty to end segregation. The two congressional authors of Title VIII specifically targeted HUD’s maintenance of segregation in public housing as an object of this legislation. In Senator Edward Brooke’s words, “Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines, one would scarcely know a Civil Rights Act [of 1964] had been passed.”

Senator Brooke continued:

Today’s Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph — even as he ok’s public housing in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration and approves the financing of subdivisions from which Negroes will be barred. These and similar acts are committed daily by officials who say they are unalterably opposed to segregation and have the memos to prove it.

. . . But when you ask one of these gentlemen why despite the 1962 [Executive] Order [11,063] most public housing is still segregated, he invariably blames it on regional custom, local traditions, personal prejudices of municipal housing officials.

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162 E.g., “It is time to adopt strategies for action that will produce quick and visible progress.” 114 Cong. Rec. 9559 (1968) (statement of Sen. Celler, Chair of the Senate Judiciary Committee and a sponsor of the Civil Rights Act of 1964).
165 42 U.S.C. § 3608(e)(3) (1982) requires the Secretary of HUD to administer HUD programs and activities “in a manner affirmatively to further the policies of this subchapter.”
168 Id. at 2281.
In the words of Senator Walter Mondale, "The record of the U.S. government in that [post-World War II] period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city . . . ."169

Courts have not clearly established whether Title VIII requires a substantial cause or "but for" proof of causation. Most courts have accepted inferences of substantial cause where such policies "tend to perpetuate" segregation along with other causal factors.170 This is consistent with the broad interpretation due all major statements of national fair housing policy.171 Applying the Title VIII conception of fair housing to HUD, Third and Sixth Circuit courts have found a strict duty that HUD not take regulatory actions which maintain segregation.172 Some courts have applied a more lenient "but for" standard,173 implying a greater readiness to find intervening factors which could supersede HUD's authorization of applicant choice. Thus, as under Title VI, a judge's choice of "but for" versus "substantial cause" could be decisive.

Due to the wide-ranging obligations imposed on HUD by Title VIII, however, the plaintiffs could more easily satisfy a "but for" standard. The Title VIII mandate to administer affirmatively would greatly strengthen an argument that HUD's ongoing failures to remedy public housing segregation breach a duty and are thus "but for" factors. If HUD had met this strict duty to cure segregation, then segregation might not exist today.174 Perhaps in reaction to the strictness of this standard, one court has found the duty to admin-

171 Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972); United States v. Parma, 494 F. Supp. at 1095 ("The existence of a discriminatory policy, statute or ordinance is itself a discriminatory pattern or practice").
The legislative history, however, in particular Senators Brooke and Mondale's floor remarks, supports a plain meaning interpretation that Title VIII's mandate to cure segregation means just that.

Courts following the Eighth Circuit's "but for" standard are unlikely to accept a strict liability view of causation, as they are wedded to more traditional notions of fault and proof. In essence, the strict liability standard adopts a substantial cause analysis. If any act or inaction of HUD contributes to segregation, HUD causes segregation. While the Fifth and Sixth Circuits justify this by weighing the equities, the Eighth Circuit approach weighs the proof of actual causes. Thus, the Title VIII duty to administer affirmatively helps the plaintiffs prove applicant choice causation of desegregation, but it does not provide a sufficient proof in every court. To satisfy "but for" courts, the plaintiffs must show that applicant choice is such a major causal factor that only in its absence could desegregation occur. The following approach might satisfy the "but for" courts.

C. Evidence Proving Applicant Choice is a Cause of Public Housing Segregation

The applicant choice cases do not analyze the social forces affecting individual choice. They either presume that applicants for public housing will always choose to live in projects where their race predominates or that absent any evidence to the contrary, applicant choice is neutral. This Note proposes that HUD knows that a combination of the following social forces compel applicants to self-segregate, thus making HUD liable for applicant choice causation of segregation.

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175 Anderson v. City of Alpharetta, Ga., 737 F.2d 1530, 1536 (11th Cir. 1984). The court held that while HUD can violate Title VIII by funding discrimination, it violated no duty through "passive review." Id. As this case involved HUD regulatory oversight and approval of discriminatory changes in public housing construction plans, the court disregarded and negated the 42 U.S.C. § 3608(e)(5) duty to administer affirmatively as well as Executive Order 12,259 codifying coverage of all regulatory activity by Title VIII.


A concern for personal safety forces minorities to avoid mostly white housing projects, usually located in all-white communities perceived by minorities as unsafe environments. HUD's knowledge and admission of this dynamic could estop the agency from refuting this argument. Similarly, pervasive segregation in the entire housing market creates a hostile environment for minorities in virtually every white community and sharply limits their housing options. This forces low-income minorities to apply for public housing and to accept offers in segregated projects. The historic identification of the U.S. government with official segregation, including public housing segregation, and the apparent federal endorsement of continued segregation, further discourages minorities from choosing predominantly white projects.

178 Green v. County School Bd., 391 U.S. 430, 440 n.5 (1968) (while declining to rule freedom of choice in public schooling per se unconstitutional, evidence of violence, threats and coercion prevented free choice for minority parents and students); NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 151 (1st Cir. 1987) (one cause of segregation is lack of safe, desegregated housing in white neighborhoods).


180 R. LaPlante, Preliminary Determination of Title VI Non-Compliance Letter from Director, HUD Office of Fair Housing Equal Opportunity, to R. Flynn, Mayor of Boston 2–3 (Oct. 14, 1987) (Boston Housing Authority cited "potential racial harassment or injury" as reason for not integrating projects); J. Vera, Memorandum from Director, Region I Office of Fair Housing Equal Opportunity, HUD, to A. Monroig, Ass't Sec. for FHEO, Regarding Public Housing Authority Desegregation Efforts 3 (June 27, 1983) [hereinafter Vera, PHA Desegregation Efforts] ("Moving minority tenants into a non-minority area without having done the advanced ground work described above will lead to racial violence and defeat any progress that may have been made and will require years of delay before another attempt at integration can be made").

181 NAACP, Boston Chapter v. Secretary of HUD, 817 F.2d 149, 151 (1st Cir. 1987) (HUD knows that segregation increases minorities' housing needs); Kushner, Fair Housing, supra note 71, at 658 ("The presence of segregation and pervasive discrimination chills the motivation of people to seek housing in nontraditional areas for lack of familiarity and fear of hostility"); Quill, supra note 9, at 17 (two studies, from 1982 and 1984, show minorities attempting to buy or rent in Boston encountered discrimination in eight of every ten attempts).

182 "[T]he minority applicant, with few other options available, has accepted the vacancy first offered while the non-minority has been able to sit back and wait for the offer of his or her choice." Vera, PHA Desegregation Efforts, supra note 180, at 2; Comment, Discrimination in Public Housing, supra note 80, at 598 n.91 (in operation of Plan B, prior discrimination may restrict minority applicants' choice, creating segregation of public housing).

183 See Title VIII Hearings, supra note 70, at 236–38.
Social science research indicates a strong preference among whites to live in all-white or predominantly white neighborhoods. Thus, white applicants will exercise available choice to maximize the chances of placement in a mostly white project. Under a Plan B TSAP system, the white applicants will refuse offers of mostly minority projects at least until the third offer. The length of time needed to ascend from the bottom to the top of the waiting list could influence the third choice. Under a Plan B system with a short waiting list ascension time, white applicants could refuse a third offer to a mostly minority project, go to the bottom and wait a relatively brief time for a new round of offers. The number and proportion of segregated projects also could affect the efficacy of applicant choice for individual self-segregation. For example, in Boston, where there are roughly thirty-three white developments and thirty-five minority developments, an applicant with three refusals would know that, discounting the smaller number of integrated developments, there is a one in two chance each offer will be for a location where the applicant’s race predominates. An applicant seeking a segregated development will be under no pressure to accept the first two offers if they are for sites where the applicant is in the racial minority. She can simply wait for the next “coin toss.”

The principal social forces compelling self-segregation are common to all PHA systems. Across the United States a hostile environment exists for minorities in white areas due to safety concerns and widespread discrimination. The legacy of government discrimination in white projects and the reality of white preference for segregation are also national phenomena. Due to these universal social

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185 For example, in Holyoke, Mass., the ascension time is two to three months. In 1986, of the 26 applicants who refused offers (under a one-offer only system) and went to the bottom of the list, 24 were white. T. Rodick, Investigation Report Under Title VI of the Civil Rights Act of 1964 in the Matter of the Holyoke Hous. Auth. 18, Case Nos. 01-82-03-035-340, 01-82-12-108-340 (1983) [hereinafter Rodick, Investigation Report].

186 E.g., Banks v. Perk, 341 F. Supp. 1175, 1185, off’d in part, rev’d in part, 473 F.2d 963 (6th Cir. 1972) (“Many whites do not desire to live on the east side [of Cleveland] and many Blacks are uncomfortable with the thought of living on the west side”).

187 E.g., Rodick, Investigation Report, supra note 185, at 18.

188 Mooney, supra note 4, at 1.
forces, applicant choice will yield a segregated housing system in any PHA with projects identifiable as white and minority. In such PHA systems, particular circumstances can only make applicant self-segregation easier or more difficult, such as the waiting list ascension time and the proportion of minority to white projects.

Normally, a government civil rights defendant is not liable for causal factors, such as these social forces, operating outside the defendant's control. Outside factors such as private housing market transactions can constitute "adventitious discrimination" which under a "but for" analysis can absolve a government defendant of liability for causing segregation. 189 *Green v. County School Board* 190 clearly found, however, that under certain circumstances a government defendant can use such outside factors to cause segregation. In *Green*, the defendant school board knew that racial violence, a hostile environment and the history of segregation frustrated free choice in the public school system for minority parents and compelled whites and minorities to self-segregate. 191 In crafting a freedom of choice desegregation plan, the school board knew that these "outside" factors would result in continued segregation. 192 Accordingly, the board was liable for causing segregation by relying on social forces normally "adventitious" and outside its control. By analogy, if HUD knows of the social forces that compel self-segregation and if the agency creates a choice TSAP policy, HUD could be liable for the social forces' causation of public housing segregation.

In a 1989 decision, *NAACP, Boston Branch v. Kemp*, 193 the U.S. District Court for Massachusetts affirmed such a theory. Applying Title VIII's duty to administer affirmatively, the court found that one factor in HUD's breach of this duty was the lack of safe housing for minorities in white areas of Boston. 194 HUD's knowledge of this problem created a Title VIII duty to require Boston to use HUD funds to construct or otherwise effect integrated housing in white areas. 195

190 391 U.S. 430 (1968).
191 *Id.* at 437.
192 *Id.* at 439–42.
194 *Id.* at 15.
195 *Id.* at 2, 6–7, 10–11, 15.
A similar theory could apply to HUD's TSAP policy. HUD clearly knows, or has breached a duty to know, of all the social forces compelling self-segregation. Title VIII requires that HUD "shall consult with state and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their state or locality."\(^{196}\) If HUD meets this duty, it must know of private housing discrimination, racial violence, hostility towards minorities in white communities, and past government discrimination in public housing. Knowledge of these forces would trigger HUD's duty to investigate the effects of its own policies\(^ {197}\) and PHAs' policies\(^ {198}\) operating in conjunction with these social forces. The agency would then have a correspondingly higher duty to act to remedy the effects of its choice TSAP policy. Otherwise, to administer affirmatively is a meaningless mandate.

If HUD does not meet these Title VIII duties to investigate, such breaches are causal factors aiding the plaintiffs' argument for "but for" causation. Courts can then impute knowledge to HUD as if the agency had conscientiously monitored the actions of PHAs and investigated the local housing market.\(^ {199}\) Thus, social forces compelling applicants for public housing to self-segregate warrant an inference of causation against HUD. This inference should be valid in every PHA system which has segregated projects and has utilized applicant choice, with HUD's approval, at some time in its history.

IV. DEFENSES TO A PRIMA FACIE CASE OF APPLICANT CHOICE CAUSATION OF SEGREGATION

After the plaintiffs make a prima facie case for causation,\(^ {200}\) HUD as defendant has the burden of showing that other forces

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\(^{198}\) Young, 628 F. Supp. at 1054–55.

\(^{199}\) Cf. id.

caused public housing segregation. HUD could make four alternative arguments: if applicant choice was a cause, intervening causes have superseded it; applicant choice is a neutral policy; applicant choice may in fact be remedial; and desegregation is impossible.

A. Intervening, Superseding Cause

HUD’s strongest defense is that, assuming arguendo that applicant choice is a causal factor, subsequent intervening factors have negated, overwhelmed or superseded applicant choice causation of segregation. If these independent forces would cause public housing segregation regardless of the existence of applicant choice, there is no “but for” causation regarding applicant choice. The principal form of this intervening, superseding cause theory is that PHAs’ illegal actions, such as discriminatory siting decisions, unequal services, and skipping policies, caused public housing segregation regardless of HUD policies. Some courts have accepted such a defense, dismissing HUD on the grounds that reaching a PHA or other local defendants could cure the injury and satisfy plaintiffs’ demands. The U.S. District Court for Southern

201 Days, School Desegregation Law, supra note 44, at 1750–51.

202 E.g., Jaimes v. Toledo Metro. Hous. Auth., 758 F.2d 1086, 1106 (6th Cir. 1985) (proximate cause not shown at trial where no argument was made that alternative policies to Plan B would cause integration), aff’d in part, rev’d in part, 833 F.2d 1203 (6th Cir. 1987); accord, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433–34 (1976) (once desegregation policy is adopted, subsequent changes in the racial mix might be caused by factors for which the defendants could not be responsible, citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971)); Kushner, Fair Housing, supra note 71, at 91.

203 According to an unpublished HUD study in 1980 of the metropolitan areas of Denver, St. Louis, Phoenix, and Columbus, Ohio, almost every siting decision made by local PHAs had the effect of increasing public school segregation. Flournoy & Rodrigue, Separate and Unequal, supra note 1, at 25A.

204 Id. at 26A.


206 Anderson v. City of Alpharetta, Ga., 737 F.2d 1530 (11th Cir. 1984). The reasoning in Anderson is questionable. HUD allowed a redesignation of federal funding from family housing to elderly. The court found that the redesignation resulted from discriminatory “obstructionist tactics of local officials.” HUD had no liability because it had no “real ability to shape their [local officials'] decisions.” Id. at 1534 n.5. Apparently the court did not consider HUD approval of funding redirection to be a direct act of HUD, and it chose to review under a minimum rationality standard despite the concededly discriminatory impact of the redesignation. Id. at 1536–37.

207 Otero v. New York City Hous. Auth., 354 F. Supp. 941, 957 n.18 (S.D.N.Y. 1973), rev’d, 484 F.2d 1122, 1131–32 (2d Cir. 1973) (it is unnecessary to reach HUD where the PHA
New York in *Otero v. New York City Housing Authority* found that the PHA superseded HUD's actions because HUD did not "affirmatively discriminated." The Second Circuit, in affirming *Otero*, stated that HUD has no regulatory duty to authorize PHA policies and is thus not liable for the effects of such policies.

The proposition that PHA actions can supersede HUD's actions is questionable. Before 1964, Public Housing Administration regulations emphasized local control over TSAPs. It is, however, plainly erroneous as a matter of law to assert, as *Otero* does, that HUD under Title VI has no duty to approve or to monitor PHA decisions regarding TSAPs. HUD is intimately involved in the PHAs' implementation of their TSAPs.

The judicial decision not to reach HUD because other defendants can remedy the harm may be reasonable in school desegregation cases. Local school boards have the authority and responsibility to desegregate without HUD approval of their acts. Such a finding of superseding cause, however, makes no sense where plaintiffs challenge HUD's own actions, mandated by its own regulations, in authorizing applicant choice TSAPs and monitoring the results of these policies.

Another form of this intervening, superseding cause defense is that HUD breaks the causal chain once it ceases or modifies the challenged acts or policies. Once plaintiffs offer sufficient proof of a specific cause, however, defendant's remedial actions cannot negate the causation as long as the discriminatory effects continue.
The defendant has the “heavy burden” of proving that the effects of the challenged policy are no longer present.\textsuperscript{215} In \textit{Vann v. Housing Authority of Kansas City, Missouri},\textsuperscript{216} HUD won dismissal on grounds of no causation simply by modifying the TSAP from a freedom of choice system to a desegregation preference TSAP.\textsuperscript{217} This result, however, is unusual in that the ruling occurred before certification of the plaintiff class. When the two minority plaintiffs’ residences became integrated after adoption of the desegregation preference TSAP, the court held no present effects existed. All the PHA’s other projects remained segregated and plaintiffs disputed the cause of the limited integration in the plaintiffs’ two projects.\textsuperscript{218} In cases where a plaintiff class is certified, \textit{Vann} really stands for a very “heavy burden” of proof for defendant. To win dismissal, HUD must show actual integration has occurred in federally subsidized housing covering the entire class.

Another variation of the intervening, superseding cause defense would be the tort notion of proximate cause. Even if applicant choice were a partial cause of public housing segregation, HUD might be so far down the causal “chain” that it would be unfair to impose liability.\textsuperscript{219} HUD has made such an argument, citing precedents where plaintiffs sued on a theory of vicarious liability.\textsuperscript{220} \textit{Young v. Pierce} rejected this defense because HUD’s acts in authorizing applicant choice were at issue, not just those of third parties, the PHAs.\textsuperscript{221} HUD is at the beginning, middle, and end of the chain of causation, due to its Title VI and Title VIII regulatory duties to approve and review PHAs’ TSAPs and other policies.

A pattern of PHA violations of HUD’s regulations is a powerful defense, as it suggests HUD was not the actual cause of segregation.

\textsuperscript{215} 628 F. Supp. at 1059–60; \textit{Vann v. Housing Auth. of Kansas City, Mo.}, 87 F.R.D. 642, 657 (W.D. Mo. 1980) (citing DeFunis v. Odegaard, 416 U.S. 312 (1974)) (dismissal only if “there is no reasonable expectation” that alleged violation will recur and if intervening acts have “completely and irrevocably eradicated the effects of the alleged violation”).

\textsuperscript{216} 87 F.R.D. 642.

\textsuperscript{217} \textit{Id.} at 656–60 (relying on \textit{Bradley v. Housing Auth. of Kansas City, Mo.}, 512 F.2d 626, 628 (8th Cir. 1975)).

\textsuperscript{218} \textit{Id.} at 652–54.

\textsuperscript{219} An analogy would be the situation of a drunk driver defendant who runs a car into an electric line pole, shutting off the power to a building a mile away, causing plaintiff’s electric heat to fail, causing the water pipes to freeze and burst, causing extensive damage to plaintiff’s apartment. Although the driver actually caused the damage to the apartment, the doctrine of proximate cause limits liability to the type of harm and to the type of victims normally foreseeable in automobile accidents.

\textsuperscript{220} \textit{Young v. Pierce}, 628 F. Supp. 1037, 1053–54 (E.D. Tex. 1985), aff’d, 822 F.2d 1368 (5th Cir. 1987).

\textsuperscript{221} \textit{Id.}
Accordingly, a decisive issue in litigating causation is whether plaintiffs can convince a court that a "but for" standard of causation is impossible to prove, given the multiple factors at work, and therefore unfair to plaintiffs. The Fifth and Sixth Circuits' anti-choice line of cases seem most in tune with modern tort and desegregation principles of fairness. Thus, where plaintiffs can show that HUD substantially contributed to segregation, HUD should bear the burden of remedying these injuries.

In interpreting Title VI in conjunction with Title VIII, the U.S. Supreme Court has not clearly stated whether "but for" or "substantial cause" is the more appropriate standard. The Court has unambiguously embraced a substantial cause analysis in Title VI school desegregation cases.\textsuperscript{222} There is little doubt, however, that the Rehnquist Court today would likely favor a "but for" principle. For example, in \textit{Wards Cove Packing Company v. Antonio},\textsuperscript{223} the Court found that to prevail in a Title VII employment discrimination case plaintiffs must identify specific discriminatory practices. Plaintiffs must also show that "each challenged practice has a significantly disparate impact."\textsuperscript{224} This analysis would reject the \textit{Young v. Pierce} approach of lumping several factors together and finding each a substantial cause.\textsuperscript{225} It is possible, however, that under \textit{Wards Cove}, once plaintiffs identify a specific discriminatory practice, they must then show only substantial cause. Justice White's words, "significantly disparate impact,"\textsuperscript{226} could suggest a major ("significantly") contributing cause rather than a "but for" factor. "[S]ignificant[t]" could refer to a large portion of the total disparate impact, implying partial causation. Alternatively, but less logically, it could describe the total amount of disparate impact, implying a standard of "but for" causation of all the segregation.

In a case involving Title VIII, the Court might resolve this ambiguity in favor of plaintiffs and apply a substantial cause anal-

\begin{itemize}
  \item \textsuperscript{223} \textit{Id.} at \textit{\ldots}, 109 S. Ct. 2115 (1989).
  \item \textsuperscript{224} \textit{Id.} at \textit{\ldots}, 109 S. Ct. at 2125.
  \item \textsuperscript{225} The dissent in \textit{Wards Cove} embraced the \textit{Young v. Pierce} view. Justice Stevens argued that where there are several questionable practices, no single one must be the sole or primary cause. Together, all the challenged practices must "fortify" a plaintiff's assertion that the practices caused racial disparities. \textit{\ldots} at \textit{\ldots}, 109 S. Ct. at 2132–33.
  \item \textsuperscript{226} \textit{Id.} at \textit{\ldots}, 109 S. Ct. at 2125.
\end{itemize}
ysis, in order to implement the strong remedial intent of Congress.\textsuperscript{227} The plain meaning and legislative history of Title VIII certainly justify an application of substantial cause to bring about actual desegregation.\textsuperscript{228} The Rehnquist Court, however, is not very deferential to Congress in the civil rights area, if \textit{Wards Cove} is any guide. If the Court were to apply “but for” causation to a challenge of HUD’s applicant choice TSAP policy, plaintiffs nonetheless could prevail by showing that this policy had a “significantly disparate impact” on public housing segregation. The available evidence seems to prove such an impact conclusively.\textsuperscript{229}

\textbf{B. Applicant Choice is Neutral and Presumed Constitutional}

The congressional supporters of Title VI in 1964 believed that once federal, state and local governments repudiated de jure segregation, their adoption of formally neutral policies of nondiscrimination would satisfy Title VI.\textsuperscript{230} Congress believed that once de jure segregation ended, applicants for public housing under freedom of choice plans could select a residence with no government coercion. Private choice alone would cause any resulting segregation.\textsuperscript{231} As expressed in the constitutional law concepts that evolved later, race-neutral choice plans avoided the pitfalls of race-conscious separate but equal policies. The latter necessarily created racial classifications in violation of the equal protection clause. Taking this a step further, neutral nondiscrimination policies, such as applicant choice, cannot require certain racial results, i.e., actual desegregation, for this would constitute race-consciousness. Thus, the optimal cure for race-conscious segregation was race-neutrality in the form of applicant choice, regardless of the segregative effects.\textsuperscript{232} The Eighth Circuit adopted this view in \textit{Jenkins by Agyei v. State of Missouri}.\textsuperscript{233}

\textsuperscript{227} \textit{See}, e.g., \textit{Trafficante v. Metropolitan Life Ins. Co.}, 409 U.S. 205, 212 (1972).
\textsuperscript{228} \textit{See supra} notes 154–69 and accompanying text.
\textsuperscript{229} \textit{See supra} notes 50–79, 176–98 and accompanying text.
\textsuperscript{230} For example, Sen. Humphrey argued, “Title VI will have little or no effect on federally assisted housing” because the existing requirements of Executive Order 11,063 sufficed. 110 CONG. REC. 6545 (1964). These requirements involved only the formal adoption of nondiscrimination policies by PHAs.
\textsuperscript{231} Comment, \textit{The Public Housing Administration}, supra note 47, at 882.
\textsuperscript{232} E.g., Jenkins v. Missouri, 593 F. Supp. 1485, 1498–99 (W.D. Mo. 1984) (sufficient for PHA to adopt a desegregation preference TSAP), overruled on other issues sub nom. Jenkins by Agyei v. Missouri, 807 F.2d 657 (8th Cir. 1986) (en banc).
\textsuperscript{233} Id.
The Supreme Court today strongly favors race-neutral remedies. The Court stated, however, in the 1989 case of *City of Richmond v. J.A. Croson Company*\(^{234}\) that it will allow race-conscious policies where there is a finding of past discrimination, alternative remedies have failed, the race-conscious policies are narrowly drawn, and Congress has mandated affirmative action.\(^{235}\) Clearly, the history of public housing segregation demonstrates that the federal government, and PHAs, have discriminated in the past;\(^{236}\) that Congress has found this discrimination existed;\(^{237}\) that applicant choice has failed to cure the historic segregation of federally subsidized housing;\(^{238}\) and that Congress has mandated affirmative action by HUD to end this segregation.\(^{239}\) If plaintiffs can propose narrowly drawn race-conscious remedial policies,\(^{240}\) they could satisfy the constitutional tests for race-conscious remedies under *Croson*.

On a more fundamental level, courts should re-examine the idea that race-neutral government policies are preferable because they avoid racial classifications, which even in remedial contexts require strict scrutiny.\(^{241}\) It is clear that facially neutral practices often produce discriminatory results.\(^{242}\) Where segregation continues unabated under formally race-neutral policies, as with public housing in the United States, the preference for race-neutrality becomes an obstacle to nondiscrimination. To put it another way,


\(^{235}\) Id. at _, 109 S. Ct. at 723–26.

\(^{236}\) See supra notes 41–59, 84–90 and accompanying text.

\(^{237}\) See supra notes 167–69 and accompanying text.

\(^{238}\) See supra notes 72–79, 81–96 and accompanying text.

\(^{239}\) See supra notes 154–69 and accompanying text.

\(^{240}\) Narrowly drawn and more effective TSAPs are certainly possible. For example, HUD could require one waiting list for all housing programs, rather than separate ones for family, elderly, Section 8, and rent/mortgage subsidy programs. “Controlled choice” plans could allow applicants some choice but PHAs would make offers so as to achieve integration. Compulsory transfers of groups of existing tenants can achieve desegregation. Ordering inter-district remedies, such as cross-district waiting lists, could desegregate suburban PHAs. In conjunction with these alternatives to choice TSAPs, HUD could exercise the Title VI power of withholding funds from a PHA or local government for noncompliance.


as *Young v. Pierce* concludes, it is much more accurate to characterize applicant choice as race-conscious, undeserving of any constitutional preference.²⁴³

The weaknesses of the pro-choice judicial analyses highlight the need for re-examining the standard preference for race-neutrality. For example, the Eighth Circuit in *Jenkins v. Missouri*²⁴⁴ upheld the U.S. District Court for Western Missouri's finding that, despite over ten years of unabated segregation in Kansas City's public housing system under Plan B, this choice TSAP was still neutral and presumed constitutional. The Kansas City PHA broke the chain of causation merely by switching to another choice 'TSAP, a desegregation preference plan.'²⁴⁵ Given the social forces compelling public housing applicants to self-segregate, desegregation preference should simply maintain segregation.

Some courts have undermined their affirmations of applicant choice neutrality through questionable findings of fact and of law. For example, *Bell v. Board of Education, Akron Public Schools*²⁴⁶ asserted in a conclusory manner that "no evidence" linked Plan B to pervasive segregation in the public housing of Akron, Ohio. The U.S. District Court for Northern Ohio and the Sixth Circuit Court of Appeals refused to find any connection between the ongoing segregation of public housing, the segregation of all neighborhoods in Akron, and the TSAP's special provision that applicants could choose a neighborhood.²⁴⁷ In short, the logic of *Bell, Jenkins* and other pro-choice cases makes "race-neutrality" a judicial fig leaf covering the reality of segregation maintenance via applicant choice.

**C. Applicant Choice Is Remedial**

Some pro-choice decisions suggest that Plan B is remedial. This idea has some basis in the legislative history of Title VIII. Senate
hearings testimony in 1967 on Title VIII indicated Congress knew of and possibly approved of Plan B.248 Furthermore, the focus of civil rights leaders' testimony on private housing discrimination perhaps implied congressional satisfaction with public housing measures.249

This analysis misreads the legislative history. Although Congress knew of HUD’s applicant choice regulations and guidelines, they were new and untested, adopted just that year.250 A passing reference in hearings testimony with no questioning or debate by committee members cannot support a conclusion of congressional endorsement of Plan B. Also, in the floor debate congressional sponsors of Title VIII condemned the agency in the harshest terms for maintaining segregation.251 Rather than endorse HUD’s desegregation efforts, Congress indicated that they were grossly ineffective.

HUD has also pointed to the disproportionately higher number of vacancies in white projects as evidence of the remedial nature of applicant choice. Plan B requires PHAs to make offers to applicants of apartments in projects with the greatest number of vacancies. According to HUD, this ensures that offers of apartments in white projects will be made to minority applicants.252 Apparently no study has ever confirmed this factual assumption about disproportionate vacancies.

248 Mr. Rutledge, a representative of the National Coalition on Housing Discrimination, an alliance of major civil rights organizations, including the NAACP, endorsed the general principle of choice: “[P]eople, regardless of race, creed, color or national origin, ought to have the right to live where they want to live . . . . [H]ousing choice or freedom of residence and increased housing supply are two sides of the same housing coin.” Title VIII Hearings, supra note 70, at 222. The witness specifically described Plans A and B as part of new HUD activity “to affirmatively implement Title VI by a policy designed to desegregate public housing.” Id. at 237. Mr. Rutledge further characterized Plans A and B as a response to pressure to improve enforcement of Title VI, giving these guidelines the apparent blessing of the civil rights movement:

Now neither Title VI of the 1964 Act nor the 1962 executive order has been effectively used. The two instruments have achieved little more than two or three modest alterations of federal policy in selection of public housing sites and tenants. And these changes I assure you, came only after concerted representations, pressure, and legal actions by NCDH, its affiliates such as the NAACP and the NAACP Legal Defense Fund, Inc., and local Negro leadership in many cities.

Id. at 218.

249 See generally Title VIII Hearings, supra note 70.

250 See supra notes 68–69 and accompanying text.

251 See supra notes 167–69 and accompanying text.

Even if the presumed vacancy proportion were true, HUD's argument that Plan B is therefore remedial is questionable. HUD assumes that minorities will accept offers in white projects. This ignores the social forces that pressure minorities to avoid accepting offers in mostly white projects. Also, in elaborating this argument HUD has acknowledged that mostly minority projects will remain segregated because white applicants will refuse assignment there. This admission estops HUD from denying that Plan B causes tenant segregation in predominantly minority projects.

D. Impossibility of Desegregation

Government defendants in civil rights cases cannot escape liability by claiming that white racism prevents desegregation. Such a defense would cater to racism in violation of the equal protection clause. A more plausible impossibility defense is that the defendant's concerted good faith efforts have been unsuccessful and that lack of resources and other constraints make desegregation impossible.

HUD's regulations allow PHAs to assert this impossibility defense in Title VI compliance reviews. The PHA "may produce evidence which indicates it expended every imaginable good faith effort to eliminate the [racial] disparity to no avail." Through public statements, HUD officials have justified HUD's own lack of success at desegregation with this impossibility defense. As a defense in court, however, this argument is weak. In Adams v. Richardson, the District of Columbia Circuit Court of Appeals rejected

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253 See supra notes 176-98 and accompanying text.
254 There were some assumptions about race which underlay the adoption of the 1967 policy [Plan B]. It was assumed that in many cities the local housing authorities had black projects with long waiting lists and white projects with no waiting lists at all. It was assumed that offers of units in white projects would overcome the reluctance of blacks to move into such projects, resulting in the desegregation of the previously white projects. The policy was not designed to desegregate black projects. Young v. Pierce, 628 F. Supp. at 1045 (citing R. Covell, Office of HUD Program Compliance, A Management Control Assessment of the HUD Tenant Selection and Assignment Policy (Dec. 14, 1981)) (emphasis added).
255 E.g., Greater Gadsden, 1 Equal Opp'y Hous. (P-H) at 13,902–03.
256 Id. at 13,903 (citing Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968)).
257 Tucker, Memorandum on Nondiscrimination, supra note 120, at 4.
258 E.g., Flournoy & Rodrigue, Separate and Unequal, supra note 1, at 24A, col. 1 (statement of Samuel Pierce, former Secretary of HUD).
the Department of Health, Education and Welfare's (HEW) impossibility defense. HEW had negotiated a voluntary desegregation plan with several local school systems. During four years of this compliance program, segregation persisted while HEW failed to collect basic data on the schools' racial composition and to monitor the local school boards' actions. The Adams court found that HEW, "having failed during a substantial period of time to achieve voluntary compliance, has a duty to commence enforcement proceedings." By analogy, Adams suggests that because HUD has known since 1969 that applicant choice contributes to segregation, by 1973 HUD had a duty to take reasonable measures to break this causation. HUD of course has taken no measures to end choice TSAPs.

HUD's possible defenses to causation all have major weaknesses, but nonetheless some courts may accept them. The Eighth Circuit, by imposing a tough "but for" standard of proving causation on the plaintiffs, more likely will accept a superseding cause defense. Although the Supreme Court's recent rulings on causation standards are ambiguous, the Court clearly would favor a standard similar to the Eighth Circuit's. Due to the Supreme Court's disfavoring of race-conscious policies, courts may give great weight to HUD's justifications of applicant choice as remedial and race-neutral. Despite the impermissibility of impossibility defenses that cater to racism, conservative members of the Supreme Court have ruled that private discrimination often prevents desegregation with no liability accruing to a government defendant. Alternatively, if stare decisis retains any vitality on the Rehnquist Court, Green v. County School Board could support a finding that HUD utilizes private choices to segregate public housing. Thus, the plaintiffs' success in proving causation may depend on the philosophical leanings of the court hearing a case.

V. CONCLUSION

While plaintiffs and commentators have often focused on siting of new housing projects in one-race neighborhoods as a cause of public housing segregation, applicant choice TSAP policies are also

260 Id. at 94.
262 See supra notes 72–79 and accompanying text.
a causal mainstay of HUD’s segregation maintenance policy. With a careful analysis of applicant choice practices and a thoughtful application of accepted principles of causation, plaintiffs could construct an effective Title VIII theory of HUD liability for public housing segregation. Such a theory could encompass all federally supported public housing in the U.S., because all PHAs adopted choice TSAPs from 1964–1967, because most PHAs presumptively have utilized choice TSAPs since 1967, and because any HUD revision of its TSAP regulations would affect all PHAs. As a cost-effective means of desegregating public housing, the replacement of applicant choice by race-conscious remedial TSAPs could avoid the chief constitutional obstacle to plaintiffs’ recovery, heavy financial burdens on PHAs, local governments and HUD. White and minority public housing tenants and applicants would benefit directly from new opportunities for integrated housing and could benefit collaterally from the fruits of a renewed judicial commitment to fair housing.

The decisive factors in any legal challenge to HUD’s TSAP policies would be the judicial determinations of two key issues: the standard of causation, either “but for” or “substantial cause”; and the existence of an ongoing mandate since Brown v. Board of Education, renewed by the passage of Title VI and Title VIII, to desegregate the entire system of federally supported public housing. Given the apparent unwillingness of Congress or the executive branch to act, the crucial ingredient to ending HUD’s policy of segregation maintenance will be a judicial commitment to apply rather than erode the principles of fairness embodied in these landmark statements of our national civil rights policy.

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