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CIVIL RIGHTS IN A DESEGREGATING AMERICA

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Nicholas O. Stephanopoulos*

The law largely has overlooked one of the most important sociological developments of the last half-century: a sharp decline in residential segregation. In 1970, 80% of African Americans would have had to switch neighborhoods for blacks to be spread evenly across the typical metropolitan area. By 2010, this proportion was down to 55%, and was continuing to fall. Bringing this striking trend (and its causes) to the attention of the legal literature is my initial aim in this Article.

My more fundamental goal, though, is to explore what desegregation means for the three bodies of civil rights law—housing discrimination, vote dilution, and school segregation—to which it is tied most closely. I first explain how all three bodies historically relied on segregation. Its perpetuation by housing practices led to disparate impact liability under the Fair Housing Act. It meant that minority groups were “geographically compact,” as required by the Voting Rights Act. And it contributed to the racially separated schools from which segregative intent was inferred in Brown and its progeny.

I then argue that all of these doctrines are disrupted by desegregation. Fair Housing Act plaintiffs cannot win certain disparate impact suits if residential patterns are stably integrated. Nor can claimants under the Voting Rights Act satisfy the statute’s geographic compactness requirement. And desegregating homes usually result in desegregating schools, which in turn make illicit intent difficult to infer.

Lastly, I offer some tentative thoughts about civil rights law in a less racially separated America. I am most optimistic about the Fair Housing Act. “Integrated and balanced living patterns” are among the statute’s aspirations, and it increasingly is achieving them. Conversely, I am most pessimistic about the Voting Rights Act. One of its objectives is minority representation, which is threatened when minorities are politically distinctive but spatially dispersed. And a mixed verdict seems in order for school desegregation law. Rising residential integration eventually should produce rising school integration. But it has not done so yet, and even when it does, this improvement may not reach schools’ other racial imbalances.

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INTRODUCTION

Two generations ago, in the wake of rioting that scarred dozens of American cities, the Kerner Commission issued its landmark report on urban unrest. The report warned darkly of high and rising racial segregation. “To continue present policies,” it intoned, “is to make permanent the division of our country into two societies: one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs.” One generation ago, a pair of prominent sociologists, Douglas Massey and Nancy Denton, penned another highly influential work on racial separation. American Apartheid traced the ways in which public policy produced what the authors termed


2 KERNER COMM’N REPORT, supra note 1, at 19; see also id. at 1 (“This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal.”).

“hypersegregation,” and argued that it was “the key structural factor[] responsible for the perpetuation of black poverty.”

In the legal academy, the conventional wisdom is that little has changed since the Kerner Report and American Apartheid. The drafter of the preeminent treatise on housing discrimination law asserts that “the United States continues to be characterized by high levels of racial segregation.” Another housing expert comments that “the failure to stem racial residential segregation has helped it to deepen, widen, and become seemingly intractable.” A recent amicus brief signed by dozens of housing scholars declares that “[r]esidential racial segregation across the United States remains pervasive.” Summing up the literature, Michael Maly observes, “The volume of research on the extent of segregation . . . makes it difficult to believe that integrated neighborhoods even exist.”

But the conventional wisdom is wrong. In fact, a great deal has changed over the last two generations—so much that sociologists are now churning out works with titles like The Waning of American Apartheid and The End of the Segregated Century. Take the most common measure of segregation, which represents the share of group members who would have to switch neighborhoods for the group to be spread evenly across a metropolitan area. This metric peaked at about 80% for African Americans in 1970. But it has since sunk to roughly 55%, the same value, more or less, as in 1910. Or consider another popular index of segregation, which captures the makeup of the community of the typical group member. In 1970, the average black lived in a neighborhood that was about 60% more black than her metropolitan area as a whole. But this figure has since dropped to roughly 30%, or approximately the same level as in 1920. Almost all of the rise in segregation that took place during the twentieth century thus has been reversed.


MASSEY & DENTON, supra note 3, at 9.


See Glaeser & Vigdor, supra note 11, at 4.
What accounts for this impressive (and underappreciated) trend? One factor is the decline in housing discrimination by both public and private parties. Overtly segregative governmental policies are now rare, and according to a series of studies by the Department of Housing and Urban Development (HUD), discriminatory acts by real estate professionals have fallen in frequency as well. Another explanation is the increased willingness of whites to live in integrated areas. In 1976, for instance, only 50% of Detroit-area whites said they would consider moving to a community that was one-fifth black. By 2004, this proportion had surged to 79%. And still another cause is the spectacular population growth of non-black minorities, in particular Hispanics and Asian Americans. These groups now seem to serve as “buffers” that enable whites and blacks to live together in durably diverse neighborhoods.

My initial aim in this Article, then, is to bring to the legal literature’s attention the recent sociological findings about the shifts in, and sources of, segregation. It is time for the stylized facts that have long guided thinking about these topics to be updated. My more fundamental goal, though, is to explore what the decline in segregation means for the law itself. At least three bodies of civil rights doctrine—invoking housing discrimination, vote dilution, and school segregation—are closely connected to racial groups’ residential patterns. For each of these areas, I show how the existence of segregation historically has supported the imposition of liability and aggressive remedies. I then argue that desegregation is reshaping the legal landscape and making key doctrinal elements harder to establish. Lastly, I offer some tentative thoughts about the role of civil rights law in a less racially separated America.

Start with housing discrimination, which is banned at the federal level by the Fair Housing Act (FHA). The FHA is tied to segregation in several ways. First, the Supreme Court has held repeatedly that plaintiffs have statutory standing if they live in areas that are segregated or in danger of becoming segregated. The deprivation of the “social and professional benefits of living in an integrated society” is a cognizable injury. Second, segregated residential patterns are useful evidence in FHA cases brought pursuant to a disparate treatment theory. They help to demonstrate the discriminatory intent of, say, housing authorities that limit low-income projects to minority-heavy areas. And third, as the Court

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15. See MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES, at xxiii (2013) (“Long-term trends in patterns of discrimination suggest that the attitudes and actions of rental and sales agents have changed over time . . . .”)

16. See Farley, supra note 10, at 40.

17. See id.

18. See, e.g., John R. Logan & Charles Zhang, Global Neighborhoods: New Pathways to Diversity and Separation, 115 Am. J. Soc. 1069, 1070 (2010) (concluding that “stable diversity is possible . . . if black entry is preceded by a substantial presence of both Hispanic and Asian residents”)


21. Gladstone, 441 U.S. at 111 (internal quotation marks omitted).
recently confirmed, one type of disparate impact claim available under the FHA is that certain practices “have the effect of perpetuating housing segregation in a community.” Both actual segregation levels and the levels that would have arisen but for the challenged practices are crucial to such a claim.

All of these aspects of FHA doctrine are destabilized by desegregation. For example, plaintiffs do not have standing (at least on this basis) if they live in areas that are integrated and likely to remain so. They do not suffer the harm of segregated living recognized by the FHA. Similarly, it is more difficult to establish discriminatory intent in the absence of segregated residential patterns. Without them, plaintiffs cannot benefit from the presumption that parties intend the foreseeable consequences of their actions. And segregative impact may not even be a viable theory of liability in a stably integrated region. It founders on both the lack of existing segregation and the improbability of demographic change.

Next take racial vote dilution, which is prohibited federally by the Voting Rights Act (VRA), and which refers to policies that diminish minorities’ electoral influence without disenfranchising them outright. In a key decision construing the VRA’s core provision, the Court held that minority populations must be “geographically compact” in order to state a claim, and that there must be racial polarization in voting. Geographic compactness is almost a synonym for geographic segregation. The criterion is satisfied only by minority groups that are densely concentrated in discrete areas. Racial polarization is related to segregation as well, only methodologically rather than substantively. It is easier to estimate the share of each racial group that supports a given candidate if there exist precincts occupied almost exclusively by each group’s members. These “homogeneous precincts” make the analysis more tractable.

Again, desegregation unsettles the doctrine. If minority populations are residentially integrated, then they cannot comply with the compactness requirement imposed by the Court, meaning that there cannot be liability under the VRA. If a jurisdiction nevertheless encloses a dispersed minority group within a single district, then the district probably violates the constitutional ban

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22 See Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, ___ S. Ct. ___, 2015 WL 2473449, at *13 (June 25, 2015) [hereinafter Inclusive Communities] (stating that FHA bans practices “creating discriminatory effects or perpetuating segregation” (emphasis added)).

23 SCHWEMM, supra note 6, at § 10-7.

24 See, e.g., Personnel Adm’r. v. Feeney, 442 U.S. 256, 278 (1979) (reciting this common law presumption). Of course, this presumption alone is insufficient to establish discriminatory intent, at least under the Equal Protection Clause. See id. at 278-80.

25 See 52 U.S.C. § 10301(b) (banning practices that result in minority members having “less opportunity . . . to elect representatives of their choice”).

26 See id. at 51. Gingles’s second prong requires minority political cohesion and its third prong requires white bloc voting. See id. In combination, they amount to a racial polarization criterion.

27 See id. at 52. Gingles’s second prong requires minority political cohesion and its third prong requires white bloc voting. See id. In combination, they amount to a racial polarization criterion.

28 See id. at 52, 53 n.20 (referring to “extreme case analysis” carried out by plaintiffs’ expert as “standard in the literature”); see also D. James Greiner, Ecological Inference in Voting Rights Act Disputes: Where We Are Now, and Where Do We Want to Be?, 47 JURIMETRICS 115, 155-57 (2007) (listing dozens of VRA cases employing homogeneous precinct analysis).
on racial gerrymandering. Race is the only justification for this kind of constituency, but it is not a permissible one. And even if a compact enough majority-minority district can be drawn in a desegregated area, plaintiffs are unlikely to be able to show that voting is racially polarized. Homogeneous precinct analysis breaks down when most precincts are racially heterogeneous, and even regressions become unreliable when two (or more) racial groups coexist throughout a region.

Last consider school segregation, which the Court forbade in perhaps the most celebrated decision in its history. School enrollments are linked to residential patterns because of the American norm of neighborhood schools. Children tend to attend schools located near their homes, thus reproducing at the school level the racial makeup of local housing. However, the correlation between residential and school segregation is imperfect. The latter also is influenced by parents’ decisions to enroll their students in private schools, as well as by an array of school district policies. Some of these policies are integrative (and often adopted due to court order): busing, magnet schools, attendance zone adjustment, and the like. Other policies, such as vouchers and charter schools, usually are enacted for non-racial reasons.

Because school segregation is a function of residential segregation and other factors, its trajectory since Brown has not been a steady descent. Instead, it plummeted in the late 1960s and 1970s, at a much faster rate than residential segregation, as courts ordered far-reaching integrative policies in hundreds of school districts. But since the late 1980s, it has remained roughly constant. The continuing decline in residential segregation has exerted a downward pressure on school segregation, but this effect has been offset by the release of many school districts from judicial supervision. At present, thanks to the removal of most court-mandated remedies, the connection between residential segregation...
and school segregation is the strongest it has been in decades.\textsuperscript{35} Going forward, this means that trends in the two metrics should be similar.

Doctrinally, then, residential segregation plays a role in school desegregation litigation to the extent—which is substantial—that it determines school enrollments. At the liability stage, racially uneven enrollments caused by racially uneven residential patterns support an inference of segregative intent on the part of the school district. Uneven residential patterns also make it more likely that policies like attendance zone demarcation and new school construction will have a segregative impact, from which an illicit motive can be inferred as well. After liability has been imposed, courts presume that enrollment imbalances are “vestiges” of the original constitutional violation that make it improper for judicial supervision to be lifted.\textsuperscript{36} Since these imbalances often are the result of residential segregation, it often prevents school districts from attaining unitary status.

Once again, desegregation complicates the picture. At the liability stage, it is more difficult for plaintiffs to establish segregative intent if school enrollments, like the residential patterns that help drive them, are integrating. There still may be an improper motive in this scenario, but it is harder to discern if it does not manifest itself in racially skewed student bodies. Likewise, when a district requests to be released from court oversight, its claim is more likely to succeed if its schools are desegregating thanks to the ongoing residential trend. School enrollment statistics are vital evidence in any unitary status proceeding, and the better they look, the better the district’s odds of terminating the litigation.

So what might we conclude about the state of civil rights law in an America in which racial and spatial divisions are (gradually) mending? I would deliver a mixed verdict. On the one hand, some of the evils the law has long fought are fading, which is cause for celebration. One of the FHA’s aspirations, in particular, is the creation of “truly integrated and balanced living patterns,” as its chief Senate sponsor put it.\textsuperscript{37} We certainly are not there yet, but this goal’s achievement is no longer wholly fanciful. Similarly, even though it is invidious intent that Brown and its progeny proscribe, the cases still envision a future “without a ‘white’ school and a ‘Negro’ school, but just schools.”\textsuperscript{38} Progress toward school integration has stalled since the late 1980s, but it is likely to resume now that residential patterns and school enrollments are so tightly coupled.

On the other hand, segregation is not the only ill that civil rights law tries to cure, and its improvement does not mean that other problems have been solved.

\textsuperscript{35} See, e.g., Erica Frankenberg, \textit{The Role of Residential Segregation in Contemporary School Segregation}, 45 \textit{EDUC. & URB. SOC’Y} 548, 557-58 (2013) (showing increase in correlation between residential and school segregation to 0.91 in 2010).

\textsuperscript{36} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 18 (1971); see also, e.g., Freeman v. Pitts, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) (observing that once a violation has been proven, “there arises a presumption, effectively irrebuttable . . . that any current racial imbalance is the product of that violation”).


For instance, both the FHA and the cases from Brown onward are deeply concerned about discrimination too—the adverse treatment of real estate customers and schoolchildren because of their race, irrespective of the segregative consequences. True, discrimination is one of the most potent drivers of segregation. But discrimination also can occur in a more integrated society, and the law needs to remain wary of it even as segregation continues to decline.

Even more worryingly, the VRA seeks to secure representation for minorities, but this aim is directly threatened by desegregation. To win districts in which they can elect their preferred candidates, minorities need to prove geographic compactness and voting polarization—both daunting tasks if they are residentially integrated. Fortunately, these hurdles are the product of the Court’s case law rather than the statute itself, and so could be lifted without legislative intervention. The Court could drop the compactness requirement that it conjured out of thin air. It could allow non-electoral evidence, survey results in particular, to be used to establish polarization. And most promisingly, it could embrace remedies other than single-member districts, thus enabling even dispersed minorities to be represented.

The Article unfolds as follows. First, in Part I, I discuss the sociological literature on racial segregation. I cover definitions of segregation, its trends for various racial groups, and the factors that cause it. Then, in Parts II-IV, I analyze the implications of declining segregation for the three bodies of civil rights law to which it is most relevant: the Fair Housing Act, the Voting Rights Act, and school desegregation doctrine. For each area, I show how it historically has relied on the existence of segregation, how it is challenged by greater residential integration, and how it might be rethought in a less racially separated environment.

One last point before beginning: While the lessening of black-white segregation is striking, not all the news here is good. For one thing, black-white segregation has not fallen at the same rate throughout the country. In numerous metropolitan areas, especially in the Midwest and Northeast, it remains stubbornly high. In addition, segregation scores for other minorities, namely Hispanics and Asian Americans, have not declined in recent years. Instead, they mostly have held steady, albeit at lower levels and despite these groups’ rising populations. And even as racial segregation wanes, income segregation is worsening. Mixed-income neighborhoods are becoming rarer, and the poor and the rich are increasingly isolated from each other. None of these developments


41 See, e.g., Sean F. Reardon & Kendra Bischoff, Income Inequality and Income Segregation, 116 AM. J. SOC. 1092, 1116 (2011) (“Average metropolitan area income segregation . . . [grew] from 1970 to 2000, with the fastest increase occurring in the 1980s.”).
refutes the optimistic premise of this project. But it is important to remember the clouds and not just the silver lining.

I. RACIAL SEGREGATION IN AMERICA

This is an odd sort of law review article, premised as it is on a sociological phenomenon, racial desegregation, of which the legal literature is mostly unaware. Because of this oddity, I think it is necessary to document the phenomenon thoroughly before turning to what it means for civil rights law. This documentation is the purpose of this Part. I hope it will convince readers that a trend that may seem counterintuitive actually is occurring.

I begin by surveying the various measures of segregation, as well as the various groups and geographic units to which they may be applied. For the most part, I use the index of dissimilarity, with respect to blacks and whites, for Census tracts nested within metropolitan areas. Next, I summarize the changes in segregation over time. Black-white segregation has declined sharply since 1970, while levels for Hispanics and Asian Americans have stayed constant (but lower) over this period. I then examine some of the reasons why black-white segregation is falling. Housing discrimination is rarer now, whites are more open to living in diverse neighborhoods, and blacks are migrating to metropolitan areas more conducive to integration. Lastly, I identify some notable caveats. Black-white segregation is still very high in certain areas, it remains sensitive to financial shocks, and socioeconomic separation is rising.

A. Definitions

Sociologists have argued for decades over how best to measure segregation. In a well-known 1955 article, Otis and Beverly Duncan observed that “[t]here have been proposed . . . several alternative indexes of the degree of residential segregation,” all derivable from what they called the “segregation curve.” Likewise, in an influential 1988 paper, Massey and Denton identified “20 potential measures of residential segregation.” They also claimed that each of these metrics corresponded to one of five distinct dimensions of segregation: evenness, exposure, concentration, centralization, and clustering.

Fortunately, segregation analysis does not, in fact, require dozens of indices or a fistful of dimensions. It is now reasonably clear that three of Massey and Denton’s dimensions (concentration, centralization, and clustering) collapse into

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42 Otis Dudley Duncan & Beverly Duncan, A Methodological Analysis of Segregation Indexes, 20 Am. Soc. Rev. 210, 210 (1955). The Duncans also concluded that “there is little information in any of the indexes beyond that contained in the index [of dissimilarity] and the city nonwhite proportion.” Id. at 214.
44 See id. at 283; see also, e.g., Sean F. Reardon & Glenn Firebaugh, Measures of Multigroup Segregation, 32 SOC. METHODS & RESEARCH 33, 36-55 (2002) (defining and assessing six measures of multigroup segregation); Michael J. White, Segregation and Diversity: Measures in Population Distribution, 52 POPUL. INDEX 198, 199-214 (1986) (same with respect to ten measures of biracial segregation).
evenness. A group that is packed into small areas, or located in the city center, or clustered in a contiguous enclave, necessarily has an uneven spatial distribution.

There also is a good deal of consensus as to how to measure the two remaining dimensions: evenness and exposure. The index of dissimilarity is the most common evenness metric. It represents the share of a group’s members who would have to move from one geographic subunit to another in order for the group to be spread uniformly across a broader geographic region. A score of 100% indicates complete segregation, in that every group member would have to move, while a score of 0% means a group is perfectly integrated. And the index of isolation is the most popular measure of exposure. It denotes, for the typical group member, the share of people in her subunit who belong to the same group. It too varies from 0% (no same-group neighbors) to 100% (all same-group neighbors).

Most sociologists further agree that, of the dissimilarity and isolation indices, the former better captures the colloquial meaning of segregation. If, in Massey and Denton’s words, “residential segregation is the degree to which two or more groups live separate from one another,” the concept is closer to the evenness of groups’ distributions than to their exposure to one another. The other advantage of the dissimilarity index is that it is insensitive to groups’ population shares. Given a particular residential pattern, it does not rise or fall as groups’ numbers change. In contrast, the isolation index is tied closely to group size. “Other factors being equal, larger ethnic groups will be more isolated than smaller ones simply because there are more coethnics present with which to share neighborhoods.” I therefore focus on the dissimilarity index here, though I also refer occasionally to the isolation index.

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45 See Sean F. Reardon & David O’Sullivan, Measures of Spatial Segregation, 34 SOC. METHODOLOGY 121, 125 (2004) (observing that “if we derived a segregation measure from information about the exact locations and spatial environments of individuals . . . there would be no conceptual distinction at all between evenness and clustering”); id. at 127 (also noting that “centralization and concentration dimensions can be seen as specific subcategories of spatial evenness”).

46 See, e.g., Claude S. Fischer et al., Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960-2000, 41 DEMOGRAPHY 37, 41 (2004) (calling dissimilarity index “the most common” measure of segregation); Salvatore Saporito & Deenesh Sohoni, Coloring Outside the Lines: Racial Segregation in Public Schools and Their Attendance Boundaries, 79 SOC. OF EDUC. 81, 93 (2006) (dissimilarity index “is considered the ‘workhorse’ of segregation measures”).

47 See, e.g., Massey & Denton, supra note 43, at 284 (defining dissimilarity index mathematically).

48 See, e.g., Iceland & Sharp, supra note 40, at 670 (calling isolation index “the most widely used measure of exposure”); Andrew L. Spivak, The Influence of Race, Class, and Metropolitan Area Characteristics on African-American Residential Segregation, 94 SOC. SCI. Q. 1414, 1419 (2013) (isolation index is one of “two types of exposure indices commonly used to measure residential segregation”).


50 Id. at 282; see also, e.g., Jeffrey M. Timberlake & John Iceland, Changes in Racial and Ethnic Residential Inequality in American Cities, 1970-2000, 6 CITY & CMTY. 335, 340 (2007) (noting historical consensus that “the index of dissimilarity (D) was the best measure of residential segregation when conceptualized as evenness of population distribution”).

51 See, e.g., JOHN ICELAND, WHERE WE LIVE NOW: IMMIGRATION AND RACE IN THE UNITED STATES 41 (2009) (“The dissimilarity index has the advantage of not being sensitive to the relative size of the groups in question.”).

52 Iceland et al., supra note 11, at 103.
Importantly, both of these indices can be calculated only for two groups at a time.\textsuperscript{53} African Americans are usually one of the two in the work I discuss, both because they have experienced the most severe discrimination of any American racial minority and because more information is available about their residential patterns.\textsuperscript{54} But I also provide data, where it exists, about Hispanic and Asian American segregation. The second group in most analyses is the non-Hispanic white population. Some studies, though, use all people who do not belong to the racial minority at issue. It is worth noting as well that scholars have begun to develop multigroup variants to the dissimilarity index, such as the entropy index.\textsuperscript{55} These alternatives are better in theory because they do not treat segregation as a biracial phenomenon,\textsuperscript{56} and I cite them where possible. Regrettably, they have not been calculated for nearly as many areas or years.

The last methodological choice for indices of segregation is to which spatial units to apply them.\textsuperscript{57} Both a subunit (such as a Census block, block group, or tract) and a broader region (such as a city, metropolitan area, or state) must be selected. Most studies use Census tracts as subunits, because they roughly coincide with neighborhoods and are designed to be “as homogeneous as possible with respect to population characteristics, economic status, and living conditions.”\textsuperscript{58} And metropolitan areas are used most often as broader regions, because they have “a high degree of social and economic integration” and constitute the relevant housing and labor markets for most people.\textsuperscript{59} Accordingly, the segregation statistics I present below typically are for tracts located in metropolitan areas.\textsuperscript{60}

\textsuperscript{53} See, e.g., Reardon & Firebaugh, supra note 44, at 34 (“[T]he major methodological developments in segregation measurement have been limited to measuring segregation between two population groups . . . .”).

\textsuperscript{54} In particular, blacks are the only minority group for which historical segregation statistics back to the nineteenth century are available. See, e.g., Massey & Denton, supra note 3, at 21; Glaser & Vigdor, supra note 11, at 4.

\textsuperscript{55} See, e.g., John Iceland, The Multigroup Entropy Index (Also Known as Theil’s H or the Information Theory Index) 7 (Dec. 2004) (defining entropy index mathematically); Reardon & Firebaugh, supra note 44, at 37 (same). Scholars also have devised explicitly spatial measures that take into account where exactly people are located. See, e.g., Reardon & O’Sullivan, supra note 45, at 136-44; Barrett A. Lee et al., Beyond the Census Tract: Patterns and Determinants of Racial Segregation at Multiple Geographic Scales, 73 AM. SOC. REV. 766, 770-73 (2008). These metrics are used even more infrequently than the multigroup ones.

\textsuperscript{56} See, e.g., Mary J. Fischer, The Relative Importance of Income and Race in Determining Residential Outcomes in U.S. Urban Areas, 1970-2000, 38 URB. AFFAIRS REV. 669, 676 (2003) (“One advantage of entropy-based measures is this ability to examine segregation between more than two groups simultaneously.”). Also usefully, the entropy index is additive and so can be subdivided between different geographic levels. See id. at 675.

\textsuperscript{57} See, e.g., Chad R. Farrell, Bifurcation, Fragmentation, or Integration? The Racial and Geographic Structure of Metropolitan Segregation, 1990-2000, 45 URB. STUD. 467, 468 (2008) (“The measurement of segregation usually entails an effort to quantify the unequal distribution of social groups across smaller geographical units . . . within a larger region . . . .”).

\textsuperscript{58} U.S. CENSUS BUREAU, GEOGRAPHIC AREAS REFERENCE MANUAL 10-1 (1994), available at http://www.census.gov/geo/www/garm.html [hereinafter CENSUS MANUAL]; see also, e.g., Iceland & Sharp, supra note 40, at 669 (“Census tracts are also by far the unit most used in research on residential segregation.”).

\textsuperscript{59} CENSUS MANUAL, supra note 58, at 13-1; see also, e.g., J. Eric Oliver, The Paradoxes of Integration 23 (2010); Iceland et al., supra note 11, at 101 (“Residential segregation usually refers to the distribution of groups . . . within metropolitan areas.”).

\textsuperscript{60} In general, the smaller the subunit considered, the higher the resulting segregation score. More variation is expressed between rather than within smaller subunits. See David W.S. Wong, Spatial Dependency of Segregation Indices, 41 CANADIAN GEOGRAPHER 128, 130-31 (1997). However, areas’ segregation rankings
This background should suffice for present purposes. Next, I summarize trends in segregation for blacks, Hispanics, and Asian Americans for all periods for which data is available. For the above reasons, I devote the most attention to the index of dissimilarity, calculated for blacks and whites and for tracts in metropolitan areas.

B. Trends

Start with the racial separation undergone by blacks. As described in harrowing detail in American Apartheid—and as shown in Figure 1 below, which is borrowed from a recent study by Edward Glaeser and Jacob Vigdor—it grew steadily from 1890 to 1970. The black-nonblack dissimilarity score of the average metropolitan area, weighted by each area’s black population, increased from about 45% to about 80% during this era. Similarly, the average black-nonblack isolation score rose from roughly 20% to roughly 60%. A useful rule of thumb is that segregation scores are high if they are above 60%, moderate if between 30% and 60%, and low if below 30%. On this scale, the peak dissimilarity experienced by blacks was extraordinarily severe, high enough to warrant labels like “hypersegregation,” and the peak isolation was very troubling too.

Since 1970, though, the situation has changed markedly for the better. Black segregation scores have now fallen for four straight decades, undoing much of the rise that occurred during the twentieth century. According to Glaeser and Vigdor, black-nonblack dissimilarity reached 55% in 2010, or about the same level as in 1910, and black-nonblack isolation neared 30%, or close to its 1920 threshold. Using a similar methodology, John Iceland and Gregory Sharp report nearly identical 2010 black-nonblack dissimilarity and isolation scores. Without weighting by black population, and using whites rather than nonblacks as the

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61 See MASSEY & DENTON, supra note 3, at 21, 24, 47 (providing dissimilarity index scores for selected cities from 1860 to 1970); Glaeser & Vigdor, supra note 11, at 4.
62 See Glaeser & Vigdor, supra note 11, at 4. Unfortunately, Glaeser and Vigdor do not calculate black-white segregation statistics, which are usually slightly higher. I am unaware of any work presenting black-white figures over such a long period.
63 See id. Glaeser and Vigdor use an idiosyncratic definition of the isolation index, adjusting its values downward by the black share of the metropolitan area population. See id. at 3. The index then “measures the tendency for members of one group to live in neighborhoods where their share of the population is above the citywide average.” Id. (emphasis added).
64 See, e.g., David M. Cutler et al., The Rise and Decline of the American Ghetto, 107 J. POL. ECON. 455, 458 (1999); Rachel E. Dwyer, Poverty, Prosperity, and Place: The Shape of Class Segregation in the Age of Extremes, 57 SOC. PROBLEMS 114, 124 (2010).
65 Massey & Denton, supra note 4, at 373.
66 Measured the usual way, again, the peak isolation was somewhat higher than reported by Glaeser and Vigdor. See supra note 63; see also Rugh & Massey, supra note 14, at 213 (showing 1970 black-white isolation of about 67%).
67 See Glaeser & Vigdor, supra note 11, at 4.
68 See Iceland & Sharp, supra note 40, at 673 (providing data from 1980 to 2010). Their isolation index score of around 45% appears higher than Glaeser and Vigdor’s only because they do not adjust downward by the black share of the metropolitan area population. See supra note 63.
reference group. William Frey calculates an even lower 2010 black-white dissimilarity score of 47%.69 And both weighting and using whites as the reference group, Reynolds Farley,70 John Logan and Brian Stults,71 and Jacob Rugh and Massey72 arrive at black-white dissimilarity scores around 59%. No matter how it is computed, then, black segregation no longer qualifies as high for the first time in a hundred years. In fact, as David Cutler points out, it is about the same as the spatial separation currently experienced by immigrants from Greece, Hungary, Ireland, Italy, and Russia.73

What accounts for this striking improvement? I address underlying causes later, but the arithmetical explanation is twofold. First, within metropolitan areas, blacks increasingly are leaving heavily black neighborhoods and moving to communities with larger white populations—which now are more demographically stable than in the past. The neighborhoods blacks are exiting are largely inner-city ghettos. Detroit and Chicago’s South and West Sides, for example, each lost close to 200,000 black residents from 2000 to 2010.74 The communities blacks are entering tend to be suburbs that formerly were mostly white but now are multiracial.75 But there also are numerous cases of urban neighborhoods, like Chicago’s Uptown, New York City’s Jackson Heights, and Oakland’s Fruitvale, developing impressive diversity.76 And the stability of newly integrated communities has increased over time, though they still are more prone to demographic transition than racially homogeneous neighborhoods.77

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69 See Frey, supra note 11, at 173 (providing data from 1930 to 2010).
70 See Farley, supra note 10, at 39 (providing data from 1980 to 2010).
71 See Logan & Stults, supra note 39, at 4 (providing data from 1940 to 2010). However, Logan and Stults find that black-white exposure has been roughly constant since 1940, due to whites’ declining share of the overall population. See id.
72 See Rugh & Massey, supra note 14, at 212 (providing data from 1970 to 2010).
73 See David M. Cutler et al., Is the Melting Pot Still Hot? Explaining the Resurgence of Immigration Segregation, 90 REV. ECON. & STAT. 478, 482 (2008) (showing dissimilarity scores above 50% for all of these groups in 2000).
74 See Frey, supra note 11, at 155; Glaeser & Vigdor, supra note 11, at 2 (“[T]he dominant trend in predominantly black neighborhoods nationwide has been population loss.”). This exodus seems to be fulfilling William Julius Wilson’s famous prediction that, as middle- and upper-income blacks exit inner-city areas, “the truly disadvantaged” will be left behind. See generally William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (1987). A new frontier for civil rights law may be how to address the particular needs of “the truly disadvantaged,” as opposed to those of blacks generally.
75 See Myron Orfield & Thomas F. Luce, America’s Racially Diverse Suburbs: Opportunities and Challenges, 23 HOU. POL’Y DEBATE 395, 401 (2013) (finding that “diverse suburbs” now “represent the largest single suburban segment—53 million people in 2010, up from 40 million in 2000”); see also Ingrid Gould Ellen, How Integrated Did We Become During the 1990s?, in FRAGILE RIGHTS WITHIN CITIES 123, 130 (John Goering ed., 2007) (showing that proportion of nearly all-white tracts fell from about 60% in 1970 to about 15% in 2000).
76 See Maly, supra note 9, at 48-213 (discussing these neighborhoods); Philip Nyden et al., The Emergence of Stable Racially and Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities, 8 HOUS. POL’Y DEBATE 491, 492 (1997) (also surveying “communities where racial and ethnic diversity has been maintained for as long as 30 years”).
77 See Ellen, supra note 73, at 134 (finding that stability of neighborhoods with black population between 10% and 50% “rose from 62 percent during the 1970s to 78 percent during the 1980s . . . to 80 percent during the 1990s”); Chad R. Farrell & Barrett A. Lee, Racial Diversity and Change in Metropolitan Neighborhoods, 40 SOC. SCI. RES. 1108, 1116-18 (2011) (finding that several types of integrated neighborhoods have stability rates above 50%, which are still lower than stability rates of homogeneous communities); Samantha Friedman, Do
Second, across metropolitan areas, blacks are migrating in large numbers from the Midwest and Northeast (where segregation levels are higher) to the South and West (where they are lower). The proportion of the country’s blacks living in the Midwest and Northeast fell from 50% in 1970 to 38% in 2007.\(^8\) Over the same period, the South’s share rose from 41% to 52% as millions of blacks streamed to metropolitan areas like Atlanta, Charlotte, and Dallas.\(^7\) This reversal of the earlier Great Migration is responsible for up to one-fifth of the overall decline in segregation since 1970.\(^8\)

Also interestingly, desegregation is not taking place because of gentrification, at least not to any significant extent. Predominantly black neighborhoods are very stable, in that they are more than 80% likely to remain predominantly black from one Census to the next.\(^8\) These communities also are very unattractive to whites. Only about 2% of them achieve a substantial level of black-white integration over the course of a decade.\(^8\) True, there are several high-profile exceptions, like New York City’s Bushwick, Philadelphia’s University City, and Washington D.C.’s U Street Corridor.\(^8\) But for the most part, gentrification is a trend of modest bite, “occur[ing] primarily at the fringe of the ghetto.”\(^8\)

Turning next to Hispanic and Asian American segregation, reliable figures for them are available only for the last few decades. The Census did not ask about Hispanic status before 1970, and the Asian American population was too small prior to 1980 for its distribution to be analyzed accurately.\(^8\) During the period for which data exists, the situation has been essentially static. Hispanic dissimilarity has hovered around 50% and Asian American dissimilarity around 40%—both squarely in the moderate zone.\(^8\) Figure 1 illustrates this point with a chart from a recent study by Rugh and Massey using whites as the reference group.\(^8\) Farley,\(^8\) Iceland and Sharp,\(^8\) and Logan and Stults\(^8\) reach virtually identical results using whites or non-minorities as the reference groups. Figure 1

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\(^7\) See Iceland et al., supra note 11, at 106.
\(^8\) See id.; see also FREY, supra note 11, at 114-30.
\(^9\) See Glaeser & Vigdor, supra note 11, at 9 (arriving at one-fifth figure); Iceland et al., supra note 11, at 115 (finding that inter-regional migration accounts for 12% of decline in black-white dissimilarity and 8% of decline in black-nonblack dissimilarity).
\(^10\) See Ellen, supra note 75, at 133; Farrell & Lee, supra note 77, at 1117; Friedman, supra note 77, at 927.
\(^11\) See id.
\(^13\) Glaeser & Vigdor, supra note 11, at 9.
\(^14\) See Iceland & Sharp, supra note 40, at 668 n.1 (“The challenge with using 1970 data is that one cannot distinguish between the ‘white’ and ‘non-Hispanic white’ population in census public use files. We also do not have data on the number of Asians in that year.”).
\(^15\) See supra note 64 and accompanying text (noting that dissimilarity scores in 30%-60% range indicate moderate segregation).
\(^16\) See Rugh & Massey, supra note 14, at 212-13. All of these studies weight metropolitan area values by the areas’ Hispanic or Asian American populations.
\(^17\) See Farley, supra note 10, at 39 (using whites as reference group).
\(^18\) See Iceland & Sharp, supra note 40, at 673 (using non-minorities as reference group).
\(^19\) See Logan & Stults, supra note 39, at 11, 17 (using whites as reference group).
also shows that the isolation of Hispanics and Asian Americans has increased since 1980. The reason, of course, is the remarkable growth of these groups’ populations, which necessarily exposes their members to more of their racial peers.

But the placid surface of Hispanic and Asian American segregation hides some turbulence beneath. Hispanics and Asian Americans who were born in the United States have dissimilarity scores about 12% and 8% lower, respectively, than their foreign-born compatriots. Foreign-born Hispanics and Asian Americans also become steadily more integrated the longer they remain in the country. The stationary top-line statistics thus reflect two opposing forces fighting to a draw: on the one hand, surging immigration with its segregative impact, and on the other, the ongoing assimilation of longer-term residents.

The top-line figures for black segregation also are the product of several different forces. Justice Stewart once deemed these causes “unknown and perhaps unknowable.” But as I explain below, sociologists actually have learned a good deal about the drivers of racial separation. Because I am most interested in the decline in black segregation since 1970, I stress factors that themselves have shifted over time.

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91 See Rugh & Massey, supra note 14, at 213; see also Iceland & Sharp, supra note 40, at 673 (showing gentler rise due to use of non-minorities as reference group).
92 See supra note 52 and accompanying text (noting that isolation index is sensitive to groups’ population shares).
93 See ICELAND, supra note 51, at 58 (using whites as reference group).
94 See id.; see also id. at 63-68 (showing similar results for specific countries of origin); Daniel T. Lichter et al., Residential Segregation in New Hispanic Destinations: Cities, Suburbs, and Rural Communities Compared, 39 SOC. SCI. RES. 215, 222 (2010) (finding that Hispanic-white segregation is higher in “new destinations” than in “established Hispanic places”).
95 See FRIEY, supra note 11, at 178 (“[T]he average ‘static’ segregation picture for Hispanics and Asians conflates both a turn toward integration among long-term residents and higher segregation levels among new immigrants.”).
C. Causes

Discrimination by public or private parties is one obvious explanation for segregation. If the government tries to confine minorities to certain areas—by reserving neighborhoods for different racial groups, refusing to provide mortgage assistance to mixed communities, restricting public housing to inner cities, and so on—it is unsurprising that segregated residential patterns arise. Likewise, racial separation follows naturally from private actions such as landlords declining to rent to minorities, realtors steering customers on racial grounds, and threats of violence against minorities who dare to cross the color line. As *American Apartheid* vividly depicts, all of these practices (and more) were used for generations to create and maintain black segregation.

However, housing discrimination has been illegal since the FHA’s passage in 1968, and two kinds of evidence show that its prevalence has, in fact, decreased.

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97 See Glaeser & Vigdor, supra note 11, at 4; Rugh & Massey, supra note 14, at 212-13.
98 See Massey & Denton, supra note 3, at 17-59 (describing these and other discriminatory governmental policies).
99 See id. at 83-114 (discussing these and other discriminatory private practices).
100 See supra notes 98-99.
First, HUD has conducted four nationwide paired-test studies, initially in 1977 and most recently in 2012. These studies rely on paired testers, matched in all respects except for race, to determine how often discrimination occurs. The idea is that if the minority tester is treated differently despite being as qualified as the non-minority tester, race must account for the disparity. As Figure 2 reveals, both rental and sales discrimination, against both blacks and Hispanics, have declined since 1977. Blacks are now almost as likely as whites to be told that advertised properties are available (compared to differences as high as 20% for rental units in 1977). The probability that blacks will be shown fewer properties than whites also has fallen to less than 5% for rental units (from a 1989 high of almost 20%). The figures for Hispanics reflect similar improvement, albeit from lower peaks.

Second, sociologists have investigated whether blacks pay more than whites for equivalent housing within a metropolitan area. If they do, it may be because their residential choices are constrained by public or private discrimination. In the absence of the discrimination, they presumably would move to more affordable neighborhoods. According to work by Cutler and his coauthors, the black housing premium was substantial in 1940, suggesting “collective action racism on the part of whites.” But by 1970 the premium had dropped by about 75%, and by 1990 it actually had switched signs, indicating that blacks paid less than whites for comparable accommodation. Other scholars report similar results; as Stephen Ross notes, “not a single study has found evidence that African Americans paid more for housing during the 1980s or 1990s.”

Moreover, not only is housing discrimination falling, but its decline has been linked causally to lower segregation. George Galster used the HUD paired-test data to measure the incidence of discriminatory practices in different metropolitan areas, as well as black-white dissimilarity scores to assess segregation. He found that discrimination is a powerful determinant of racial separation. “If we could somehow eliminate discrimination in both rental and sales sectors . . . we would predict . . . a 25-point (50 percent) decrease in the

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102 See id. at 5-11 (discussing paired testing protocols).
103 See id. at 3 (“When large numbers of consistent and comparable tests are conducted . . . they directly measure patterns of adverse treatment based on race or ethnicity.”).
104 See id. at 68.
105 All of these percentages are net figures that indicate how often the non-minority tester is favored minus how often the minority tester is favored. See id. at xii.
106 See id. at 68. However, the trend for homes is more static. See id.
108 Cutler et al., supra note 64, at 483.
109 See id. at 483-87.
110 See id. at 483-87.
index of segregation within the black community."\textsuperscript{112} This is a large effect, and it helps explain why discrimination and segregation have decreased in tandem over the last few decades.\textsuperscript{113}

An alternative account of segregation attributes it to racial groups’ divergent residential preferences. Thomas Schelling popularized this explanation in a famous 1971 paper.\textsuperscript{114} He explained how almost complete racial separation could arise even if there is no discrimination and most whites and blacks are willing to live in integrated neighborhoods.\textsuperscript{115} The crux of the problem is that whites and blacks often mean different things by integration. Whites may be willing to tolerate communities up to, say, 20% black, while blacks may prefer areas that are, say, 50% black.\textsuperscript{116} In this scenario, blacks will continue entering a neighborhood until it is evenly split. But whites will exit when the black population hits 20%, thus producing segregation despite both groups’ wishes to the contrary.\textsuperscript{117}

The extent of racial separation in Schelling’s model is highly sensitive to whites’ preferences.\textsuperscript{118} And on this front too, the trends are encouraging. Farley carried out surveys of white Detroit-area residents in 1976, 1992, and 2004, each time asking about their views of neighborhoods in which one to seven out of fifteen homes are owned by blacks.\textsuperscript{119} As Figure 2 displays, all of the change in this period favored integration.\textsuperscript{120} For instance, with respect to a community that is one-fifth black, 83% of whites said they would feel comfortable living there in 2004 (versus 58% in 1976), and 8% said they would leave the area (versus 24%).\textsuperscript{121} Nationwide polls asking whether whites would sell their homes if blacks came to live “next door” or “in great numbers in your neighborhood” point to similar progress.\textsuperscript{122} By the late 1990s, almost no whites said they would sell if blacks moved in next door (versus nearly 40% in 1965), and about 30% said they would sell if faced with great numbers of blacks (versus about 70%).\textsuperscript{123}

\begin{footnotesize}
\textsuperscript{112} Id. at 113.
\textsuperscript{113} Cf. MASSEY & DENTON, supra note 3, at 109 (commenting that Galster “confirmed the empirical link between discrimination and segregation”).
\textsuperscript{114} See Thomas C. Schelling, Dynamic Models of Segregation, 1 J. MATH. SOC. 143 (1971).
\textsuperscript{115} See id. at 149-86.
\textsuperscript{116} See Bell & Parchomovsky, supra note 8, at 1987 (also using these assumptions).
\textsuperscript{117} See id. at 1985-87 (discussing “tipping” phenomenon); Schelling, supra note 114, at 181-86 (same). There are additional complexities to Schelling’s model, such as the distributions of whites’ and blacks’ preferences, that I do not address here.
\textsuperscript{118} See Schelling, supra note 114, at 171 (“The outcome depends on the shapes we attribute to the tolerance schedules...”).
\textsuperscript{119} See Farley, supra note 10, at 39-41.
\textsuperscript{120} See id. at 40.
\textsuperscript{121} See id. For examples of other scholars noting this improvement, see Camille Zubrinsky Charles, The Dynamics of Racial Residential Segregation, 29 ANN. REV. SOC. 167, 184 (2003); and David R. Harris, Why Are Whites and Blacks Averse to Black Neighbors?, 30 SOC. SCI. RES. 100, 101 (2001). Black residential preferences largely held steady over this period, reflecting “a clear preference for 50/50 neighborhoods.” Camille Zubrinsky Charles, Who Will Live Near Whom?, POVERTY & RACE, Sep/ Oct. 2008.
\textsuperscript{122} Lawrence D. Bobo, Racial Attitudes and Relations at the Close of the Twentieth Century, in 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 264, 270 (Neil J. Smelser et al. eds., 2001).
\textsuperscript{123} See id.; see also HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 112 (1985) (showing similar trends through early 1980s).
\end{footnotesize}
Of course, survey results can be criticized on the ground that respondents are reluctant to admit to racist preferences. But Cutler and his coauthors find that self-professed views are tied to actual segregation levels.\textsuperscript{124} Black-white dissimilarity scores are higher in metropolitan areas where more whites believe that “[w]hite people have a right to keep blacks out of their neighborhoods” and oppose “living in a neighborhood where half of your neighbors [are] black.”\textsuperscript{125} Also persuasively, David Card and his coauthors calculate “tipping points”—the black population shares above which whites exit neighborhoods en masse—for several metropolitan areas over time.\textsuperscript{126} In Midwestern cities like Chicago and Detroit, tipping points increased from almost 0\% in 1940 to roughly 10\% in 1990.\textsuperscript{127} Nationally, they rose from about 9\% in the 1970s to about 14\% in the 1990s.\textsuperscript{128} People’s answers to polls, it seems, are not just cheap talk.

That people’s answers are improving, though, leaves open the question of why this shift is occurring. Part of the story surely is a society-wide decline in anti-black racism.\textsuperscript{129} But as Logan and Charles Zhang show, another piece is the growth of Hispanic and Asian American immigration—and the accompanying rise in the number of neighborhoods with sizable white, black, Hispanic, and Asian American contingents.\textsuperscript{130} These multiracial communities are quite stable, enduring into the next decade about 75\% of the time.\textsuperscript{131} Both whites and blacks also are willing to move into them, in contrast to most other neighborhood types.\textsuperscript{132} And the more whites and blacks that entered them from 1980 to 2000, the more steeply metropolitan areas’ black-white dissimilarity scores fell.\textsuperscript{133} These findings suggest that whites are now more willing to live with blacks, at least in part, because they do not have to live only with blacks. Hispanics and Asian Americans increasingly serve as buffers that convince whites not to leave communities with substantial black populations.\textsuperscript{134}

\textsuperscript{124} See Cutler et al., supra note 64, at 488-90.
\textsuperscript{125} Id.; see also Rugh & Massey, supra note 14, at 216 (finding that anti-black racism, measured by frequency of Google searches for racial slurs, is powerful driver of black-white dissimilarity index).
\textsuperscript{127} See id. at 1093; see also supra note 77 and accompanying text (noting greater stability of multiracial neighborhoods).
\textsuperscript{128} See Logan & Zhang, supra note 18, at 1082 (showing increase in number of multiracial “WBHA” tracts from 2,422 in 1980 to 3,792 in 2000).
\textsuperscript{129} See Card et al., Mixed, supra note 126, at 21.
\textsuperscript{130} See Card et al., Tipping, supra note 126, at 192.
\textsuperscript{131} See generally SCHUMAN ET AL., supra note 123 (finding decreases in racism in many areas); Iceland & Sharp, supra note 40, at 666 (“The proportion of Whites holding blatantly racist attitudes has dropped considerably over the decades . . . .”)
\textsuperscript{132} See Logan & Zhang, supra note 18, at 1087 (showing increase in number of multiracial “WBHA” tracts from 2,422 in 1980 to 3,792 in 2000).
\textsuperscript{133} See id. at 1093; see also supra note 77 and accompanying text (noting greater stability of multiracial neighborhoods).
\textsuperscript{134} See FREY, supra note 11, at 174 (noting that “other minorities can serve to ‘buffer’ these [white-black] divisions”); ICELAND, supra note 51, at 6 (observing that “immigration has softened the black-white divide”).
A final set of causes of segregation involve metropolitan areas’ characteristics.\textsuperscript{135} Studies by several scholars conclude that residential patterns, to some degree, are a function of areas’ demographics, housing stock, and policies. In particular: Total metropolitan area population is linked to higher segregation.\textsuperscript{136} Areas where more residents belong to the military tend to be less segregated.\textsuperscript{137} Areas where more housing has been constructed in the previous decade also usually exhibit less racial separation.\textsuperscript{138} And the more permissive an area’s zoning regime (measured by the weighted average of the development densities allowed by each of the jurisdictions within it), the lower the area’s segregation.\textsuperscript{139}

These factors have contributed to the decline in black segregation because they favor the Southern and Western metropolitan areas to which blacks have been migrating.\textsuperscript{140} Iceland and his coauthors observe that Southern and Western areas have fewer total residents, larger military populations, and newer housing stock than their Midwestern and Northeastern peers.\textsuperscript{141} Similarly, Jonathan Rothwell notes that “[w]ith respect to density regulation, the West is the most liberal, followed by the South, and both are significantly more liberal than the Midwest and Northeast.”\textsuperscript{142} As blacks move from areas whose attributes worsen segregation to areas with more favorable profiles, less racial separation is the predictable result.

On balance, my reading of the relevant literature is therefore optimistic. By any metric, black segregation has fallen sharply since 1970, and this decrease is backed fully by positive trends in the forces that drive racial separation. What is more, there is no reason why this progress should halt in the future. As Iceland writes, “multiple forms of assimilation [should] largely reduce the significance of

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\textsuperscript{135} People’s \textit{incomes} are still another potential driver of segregation. It could arise because different racial groups have different average incomes, and so can afford to live in different neighborhoods. Historically, income made almost no difference for black segregation; rich blacks were just about as racially separated as poor blacks. Other factors, such as housing discrimination and divergent residential preferences, thus were responsible for black segregation. \textit{See, e.g.,} MASSEY & DENTON, supra note 3, at 86; Camille Zubrinsky Charles, Neighborhood Racial-Composition Preferences: Evidence from a Multietnic Metropolis, 47 SOC. PROBS. 379, 380 (2000). But in recent years, income has become a better predictor of how segregated blacks are. Wealthy blacks are now substantially less racially separated than disadvantaged ones. This confirms the account of discrimination and residential preferences no longer obstructing integration to the same extent. \textit{See, e.g.,} ICELAND, supra note 51, at 47; Lincoln Quillian, \textit{Why Is Black-White Residential Segregation So Persistent? Evidence on Three Theories from Migration Data}, 31 SOC. FORCES 197, 218 (2002).

\textsuperscript{136} \textit{See} Iceland et al., supra note 11, at 110; John R. Logan et al., \textit{Segregation of Minorities in the Metropolis: Two Decades of Change}, 41 DEMOGRAPHY 1, 15 (2004); Rugh & Massey, supra note 14, at 217; Timberlake & Iceland, supra note 50, at 352.

\textsuperscript{137} \textit{See id.} (all studies reporting same findings).

\textsuperscript{138} \textit{See id.} (same).


\textsuperscript{140} \textit{See supra} notes 78-80 and accompanying text (discussing black migration patterns).

\textsuperscript{141} \textit{See} Iceland et al., supra note 11, at 112.

\textsuperscript{142} Rothwell, supra note 139, at 345; \textit{see also} Rothwell & Massey, supra note 139, at 793.
various color lines in metropolitan America. However, it is important not to paint too rosy a picture. As I next discuss, American residential patterns remain troubling in several respects. These problems do not contradict the account I have given so far, but they do cast a considerable shadow.

D. Caveats

The most critical caveat is that black segregation is still severe in numerous metropolitan areas, especially in the Midwest and Northeast. According to the

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143 ICELAND, supra note 51, at 104; see also, e.g., FREY, supra note 11, at 176 (“[N]ew forces affecting black-white segregation are ushering in an era that will be quite different from the era of wholesale ghettoization of the black population.”).

144 See TURNER ET AL., supra note 15, at 68; Farley, supra note 10, at 40.
2010 Census, more than 70% of blacks would have to switch neighborhoods to achieve an even black-white distribution in Chicago, Cleveland, Detroit, Miami, Milwaukee, Newark, New York City, Philadelphia, and St. Louis.\textsuperscript{145} Another twelve areas have black-white dissimilarity scores above 60% (and so in the high zone).\textsuperscript{146} The scores in these areas also are not improving as quickly as in the rest of the country. As shown in Figure 3, which is taken from a study by Iceland and his coauthors,\textsuperscript{147} black-white dissimilarity declined at a markedly lower rate from 1970 to 2007 in the Midwest and Northeast than in the South and West. These statistics mean that far too many blacks continue to be trapped in highly segregated communities rife with poverty and crime.\textsuperscript{148}

A related point is that the gains in black integration are fragile; they may be reversed, or at least slowed, by economic setbacks. During the financial crisis of the late 2000s, for example, foreclosure rates were almost four times as high in racially mixed neighborhoods (8.6%) as in heavily white ones (2.3%).\textsuperscript{149} Many whites in mixed communities responded to the housing market’s deterioration by moving to more homogeneously white areas. As Matthew Hall and his coauthors find, the white population share in mixed neighborhoods dropped by 0.3% from 2000 to 2010 for every one-point increase in the local foreclosure rate.\textsuperscript{150} A consequence of this white exit was a rise of about 1% in the black-white dissimilarity index.\textsuperscript{151} That is, black segregation would have fallen by roughly 1% more over the decade had the financial crisis not struck.\textsuperscript{152}

Another proviso has to do with the geographic level at which integration is occurring. Blacks and whites living in tracts within center cities and suburbs now are substantially less separated than they were in earlier periods.\textsuperscript{153} But black-white segregation between center cities and their surrounding suburbs, and from

\textsuperscript{145} See Logan & Stults, supra note 39, at 6 (only covering fifty metropolitan areas with largest black populations).

\textsuperscript{146} See id.; see also Glaeser & Vigdor, supra note 11, at 11-26 (providing 2010 black-nonblack dissimilarity scores for all metropolitan areas).

\textsuperscript{147} See Iceland et al., supra note 11, at 107; see also Rugh & Massey, supra note 14, at 221 (showing very slow black-white dissimilarity decline for five most segregated metropolitan areas).

\textsuperscript{148} For a sampling of the vast literature documenting the ill effects of segregation, see Massey & Denton, supra note 3, at 1-16, 115-216; Oliver, supra note 59, at 147; Charles, supra note 121, at 197-99; and Cutler et al., supra note 64, at 761-62. Based on this literature, I assume here that integration is desirable and segregation is an evil to be avoided. But due to space constraints, I do not defend this assumption at any length.

\textsuperscript{149} See Matthew Hall et al., Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation, 80 Am. Soc. Rev. (forthcoming 2015) (manuscript at 9); see also Jacob S. Rugh & Douglas S. Massey, Racial Segregation and the American Foreclosure Crisis, 75 Am. Soc. Rev. 629, 639 (2010) (finding that foreclosure rate was higher in metropolitan areas with higher black-white dissimilarity scores).

\textsuperscript{150} See Hall et al., supra note 149 (manuscript at 11).

\textsuperscript{151} See id. (manuscript at 15) (also finding rise of about 2% in Hispanic-white dissimilarity index).

\textsuperscript{152} See id.; see also Richard Rothstein, A Comment on Bank of America/Countrywide’s Discriminatory Mortgage Lending and Its Implications for Racial Segregation 3 (EPI Briefing Paper #335, Jan. 23, 2012) (speculating that blacks whose homes were foreclosed may have had to “return to more racially isolated and poorer ghettos,” thus also increasing black segregation).

\textsuperscript{153} See Fischer et al., supra note 46, at 47 (providing data from 1960 to 2000); Daniel T. Lichter et al., Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs, 80 Am. Soc. Rev. 843, 856 (2015) (providing data from 1990 to 2010).
one suburb to another, has stayed roughly constant. The main driver of the country’s desegregative trend thus is greater black-white intermingling within individual municipalities. Racial separation at the inter- (as opposed to intra-) municipality level has not declined noticeably.

Still another red flag is (largely) non-racial. Segregation along socioeconomic lines, such as income, education, and profession, has surged since 1970. Recent work by Sean Reardon and Kendra Bischoff, which also is displayed in Figure 3, makes this point with respect to income. The rank-order entropy index, which measures the extent to which tracts’ income distributions diverge from that of the metropolitan area as a whole, increased from about 12% in 1970 to about 16% in 2000. This rise was propelled by growing income inequality, and it was the wealthy who were most segregated from other income groups throughout this period. Massey and his coauthors come to similar conclusions for education and profession. The dissimilarity index for high school and college graduates increased from roughly 20% in 1970 to roughly 35% in 2000. Dissimilarity between blue- and white-collar workers also rose from about 12% to about 17%.

And there are two reasons why race is implicated here too. First, as Rachel Dwyer shows, the rich and the poor are more likely to be separated spatially in metropolitan areas that have larger black populations and higher black-white dissimilarity scores. Black segregation appears to fuel income segregation. Second, as Figure 3 further illustrates, income segregation within the black population is now higher, and has increased at a faster rate, than intra-white income segregation. This development may be attributable to the movement of middle- and upper-income blacks to suburban areas, away from the poorer blacks remaining in inner cities. Whatever its cause, the rise in intra-black income segregation means that the rise in overall income segregation is not due to growing income inequality alone. Race, as ever, continues to be part of the story.

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154 See id. Notably, Lichter et al. report a rise in the share of total segregation explained by macro components, but the actual level of macro segregation has remained about the same. See Lichter et al., supra note 153, at 856.
155 See Reardon & Bischoff, supra note 41, at 1117.
156 See id. at 1110-14 (referring to metric as “rank-order information theory index”).
158 See Reardon & Bischoff, supra note 41, at 1138 (concluding that “increasing income inequality was responsible for 40%-80% of the changes in income segregation from 1970 to 2000”).
159 See id. at 1120; see also REARDON & BISCHOFF, supra note 157, at 16; Fischer, supra note 46, at 50.
160 See Massey et al., supra note 157, at 84.
161 See id. at 86 (calculating index using congressional districts as subunits).
162 See Dwyer, supra note 64, at 130; see also RICHARD FLORIDA & CHARLOTTE MELLANDER, SEGREGATED CITY: THE GEOGRAPHY OF ECONOMIC SEGREGATION IN AMERICA’S METROS 19-20 (2015) (also finding that wealthy are more segregated in metropolitan areas with higher black population shares).
163 See Reardon & Bischoff, supra note 41, at 1117.
164 See id. at 1139.
A final caveat is that while black-white separation is decreasing, no comparable progress is being made in many other areas. The black-white gap in median household income has remained constant over the last fifty years. So has the black-white difference in life expectancy. The gulf between black and white incarceration rates has grown substantially since 1960. And as I have found in earlier work, blacks remain politically powerless relative to whites, at both the federal and state levels. These statistics are highly troubling and call for both academic analysis and policy change. But they are not the subject of this Article, which is limited to housing patterns and their consequences.

The above discussion was so detailed because the phenomenon it described is so surprising to many legal observers. Given America’s fraught racial history, black desegregation is not a trend that can be asserted without extensive documentation. From this point forward, though, I take as a given the decline in black-white separation, and turn my attention from sociology to law. My goal is to explore the implications of rising integration for the three civil rights domains.

169 See Iceland et al., supra note 11, at 107; Reardon & Bischoff, supra note 41, at 1117.
most closely linked to racial groups’ residential patterns: the Fair Housing Act, the Voting Rights Act, and school desegregation law. For each area, I show how it historically has depended on the existence of segregation, how it is unsettled by desegregation, and how it might be reconsidered in a less racially separated society.

Two more points before continuing: First, it is true that other civil rights statutes are related to residential patterns too. The Community Reinvestment Act aims to prevent “redlining,” or discrimination in mortgage lending against minority-heavy areas. Title VI of the Civil Rights Act imposes on school districts receiving federal funds some of the same obligations created by the Constitution. Title VII employment discrimination cases often consider how companies’ applicant pools are shaped by racial segregation in the region. And so forth. In my judgment, though, these ties are not as significant as the ones of the areas I address. These areas also seem like more than enough ground for a single Article to cover.

Second, because the legal literature neither has traced the links between civil rights law and segregation nor has noticed the trend toward desegregation, I rely primarily on court decisions below. These decisions, by the Supreme Court as well as lower bodies, dramatize how closely the doctrine is connected to racial groups’ residential patterns. They illustrate the many ways in which segregation traditionally has assisted plaintiffs—and in which integration increasingly benefits defendants. Of course, the decisions I highlight are not chosen at random. But even though they are not a representative sample, they still demonstrate that race and place are crucial building blocks of the civil rights edifice.

II. FAIR HOUSING ACT

The Fair Housing Act is the logical law with which to begin. Residential segregation and integration are, at their core, properties of people’s housing, and it is the FHA that deals most directly with the racial aspects of the housing market. In this Part, I first identify the various ways in which segregation historically has facilitated the imposition of liability and aggressive remedies under the FHA. It has given rise to standing; supported findings of disparate treatment, disparate impact, and failure to further integration affirmatively; and justified far-reaching remedial measures.

Next, I argue that all of these pillars of FHA doctrine are shaken by desegregation. Standing is harder to establish in stably integrated areas. Actors in these areas also often cannot be held liable on any theory, whether based on intent, effect, or effort. And potent remedies are both less necessary and more likely to be deemed unlawful. Lastly, I offer a sketch of how the FHA might

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operate in a more integrated future environment. The statute’s desegregative components might go into a kind of remission, remaining available in theory but seldom being used successfully in practice. But its antidiscrimination provisions would remain (almost) as vital as ever.

A. Connection

The FHA prohibits an array of housing-related actions from being taken “because of race [or] color.” Among other things, parties cannot “refuse to sell or rent,” “discriminate . . . in the terms, conditions, or privileges of sale or rental,” “represent . . . that any dwelling is not available for inspection, sale, or rental,” or “otherwise make unavailable or deny[] a dwelling” on racial grounds. The FHA also announces that “[i]t is the policy of the United States to provide . . . for fair housing throughout [the country],” and requires all federal agencies involved in administering the law “affirmatively to further [its] purposes.”

Like most causes of action, the FHA can be divided into three topics: standing, liability, and remedy. In turn—and as recently confirmed by the Supreme Court—liability under the statute can come about in three ways: disparate treatment, disparate impact, and failure to further the law’s purposes affirmatively. As I explain below, the segregated residential patterns that persisted for much of the FHA’s history (and that still persist in several metropolitan areas today) made all of these elements easier to prove. If not quite indispensable, segregation at least was highly conducive to the success of plaintiffs’ claims.

Start with standing to file suit. In a trio of early decisions, the Court held that plaintiffs have standing if they live in areas that are segregated, or threaten to become segregated, because of defendants’ actions. In a 1972 case, the claimants were tenants in a San Francisco apartment complex that was almost all-white due to the landlord’s discrimination against nonwhite applicants. The Court agreed that the claimants had been injured by “[l]osing[] the social benefits of living in an integrated community” and “being ‘stigmatized’ as residents of a ‘white ghetto.’” Likewise, in cases from 1979 and 1982, the plaintiffs lived in mixed neighborhoods within the Chicago and Richmond metropolitan areas.

173 To be clear about terms, I am distinguishing discrimination from segregation here, not from disparate impact. Both disparate treatment and disparate impact claims can proceed under both antidiscrimination and desegregation theories.
174 42 U.S.C. §§ 3604-06.
175 42 U.S.C. § 3604(a), (b), (d).
176 Id. § 3601.
177 Id. § 3608(d).
178 See Inclusive Communities, 2015 WL 2473449, at *17 (holding that disparate impact theory is cognizable under FHA).
179 I note that I only cover elements of FHA (and VRA and school desegregation) doctrine that are linked to racial groups’ residential patterns. I do not discuss the numerous doctrinal elements that are unrelated to segregation or integration.
181 Id. at 208.
respectively, that were segregating due to racial steering by realtors. Here too the plaintiffs were harmed because the “transformation of their neighborhood from an integrated to a predominantly Negro community . . . deprived them of ‘the social and professional benefits of living in an integrated society.’”

Importantly, the Court based its conclusion that standing follows from segregation on its understanding of the FHA’s purposes. The Court observed in the 1972 case that the law does not only target “discriminatory housing practices.” Rather, it also aims to “replace the ghettos ‘by truly integrated and balanced living patterns,’” as the FHA’s architect, Senator Walter Mondale, put it. Other legislative history confirms the statute’s dual goals of antidiscrimination and desegregation. One key congressman stated that the FHA would combat the “blight of segregated housing and the pale of the ghetto.” Another commented that the law would help “achieve the aim of an integrated society.” These remarks provide context for the Court’s position that plaintiffs in segregated (or segregating) areas suffer a cognizable injury. Even if they are not subjected to discrimination, they are victims of another ill that the FHA seeks to cure.

Next consider theories of liability under the FHA, the first (and most common) of which is invidious intent demonstrated by disparate treatment of similarly situated individuals. Evidence that segregation is high in an area, in part because of a defendant’s actions, does not prove that the defendant had a discriminatory or segregative motive. But as courts often have recognized, it is strong circumstantial support for the proposition. For instance, almost all of Yonkers’s minority residents lived in its southwest quadrant in the 1980s, and its other neighborhoods were almost entirely white. This pattern had several causes, one of which was the city’s policy, followed for nearly half a century, of placing essentially all public housing units in the same minority-heavy zone.

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182 See Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 95 (1979) (noting that steering “is affecting the village’s racial composition, replacing what is presently an integrated neighborhood with a segregated one”).
183 Gladstone, 441 U.S. at 111; see also Havens, 455 U.S. at 376.
184 Trafficante, 409 U.S. at 211.
185 Id. (quoting 114 Cong. Rec. 2706 (1968)); see also Inclusive Communities, 2015 WL 2473449, at *17 (“The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”).
187 114 Cong. Rec. 9591 (1968) (statement of Rep. Ryan); see also SCHWEMM, supra note 6, at §2-3 (“This legislative history makes clear that residential integration is a major goal of the Fair Housing Act, separate and independent of the goal of expanding minority housing opportunities.”); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (“[T]he elimination of segregation is central to why the Fair Housing Act was enacted.”).
188 See SCHWEMM, supra note 6, at §10-2 (noting that disparate treatment claims “account for most of the litigation under the Fair Housing Act”).
190 See id. at 1186-93 (recounting city’s housing decisions from 1940s to 1980s).
confining subsidized housing to Southwest Yonkers” convinced the Second Circuit that the city had “intentionally enhanced racial segregation.” 24

Illicit intent was inferred from segregation on even starker facts in a 1980 case involving Parma, a suburb of Cleveland. Parma was “virtually all-white” in this era, while “[a]n extreme condition of racial segregation exist[ed] in the Cleveland metropolitan area.” 192 Parma maintained its racial homogeneity through “opposition to any form of public or low-income housing,” as well as strict zoning regulations and the “creation of [an] image of racial exclusion” by the town’s political leaders. 193 Faced with this evidence, the court concluded, “These actions . . . are evidence of a segregative intent. They had a segregative effect which was not only foreseeable, but actually foreseen.” 194

A second FHA theory is disparate impact—and one of the ways it may be shown, in the words of a recent HUD regulation, is that “[a] practice creates, increases, reinforces, or perpetuates segregated housing patterns.” 195 The link between racial separation and liability could not be clearer here. Segregation itself, as long as it is partly attributable to the challenged practice, represents a prima facie case of an FHA violation. 196 One type of policy that numerous plaintiffs have challenged successfully on this basis is a zoning restriction that prevents low-income developments (which would be attractive to minorities) from being built in a heavily white area. 197 For example, Sunnyvale, an almost all-white suburb of Dallas, banned apartments outright and imposed a one-acre requirement for homes in the 1990s. 198 These policies caused Sunnyvale’s

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191 Id. at 1184; see also id. at 1222 (concluding that given “the impact of the City’s decisions,” Yonkers’s claim that it lacked “a segregative purpose” was “frivolous”).
192 United States v. City of Parma, 494 F. Supp. 1049, 1055-56 (N.D. Ohio 1980); see also id. at 1055-65 (discussing levels and causes of segregation in Cleveland area).
193 Id. at 1066, 1072; see also id. at 1065-94 (discussing Parma’s racially exclusionary policies).
194 Id. at 1097. For other examples of segregation helping to establish discriminatory intent, see Zach v. Hussey, 394 F. Supp. 1028, 1054 (E.D. Mich. 1975) (involving racial steering by realtors in Detroit metropolitan area); and Kennedy Park Homes Ass’n v. City of Lackawanna, 318 F. Supp. 669, 695 (W.D.N.Y. 1970) (involving Buffalo suburb’s refusal to approve low-income housing). See also Valerie Schneider, In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act, 79 Mo. L. Rev. 539, 566 (2014) (“[D]isparate impact evidence can be properly used to help prove disparate treatment claims.”).
195 24 C.F.R. § 100.500(a); see also SCHWEMM, supra note 6, at § 13:12 (noting that disparate impact liability arises if “the defendant’s action . . . perpetuate[s] residential segregation in an area”).
196 The circuits differ in exactly what doctrinal steps follow after a plaintiff has established that a defendant’s practice perpetuates segregation. See Inclusive Cmty’ts, Project, Inc. v. Tex. Dep’t of Hous. and Cmty. Affairs, 747 F.3d 275, 281 (5th Cir. 2014) (listing various judicial approaches). A 2013 HUD rule recommends that, after a plaintiff makes out a prima facie case, (1) the defendant “has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” and then (2) if this burden is met, the “plaintiff may still prevail upon proving that the . . . interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.” 24 C.F.R. § 100.500(c). The Supreme Court recently referred favorably to this framework. See Inclusive Communities, 2015 WL 2473449, at *5, 14.
197 For other examples of zoning restrictions leading to disparate impact liability, seeMetro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (perpetuation of segregation by Chicago suburb’s refusal to rezone to allow construction of low-income housing); and United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (same by St. Louis suburb’s refusal). See also Inclusive Communities, 2015 WL 2473449, at *13 (referring to such cases as “hearthland of disparate-impact liability”).
housing to be unaffordable for most minorities, thus “perpetuat[ing] segregation in a town that is 97 percent white” and breaching the FHA.\footnote{199 See id. at 568.}

Another practice that frequently has been deemed unlawful because of its segregative effect is the restriction of public housing to minority-heavy neighborhoods.\footnote{200 For other examples of public housing placement leading to disparate impact liability, see King v. Harris, 464 F. Supp. 827, 835 (E.D.N.Y. 1979), vac’d, 446 U.S. 905 (1980) (holding that new public housing in Staten Island neighborhood near racial tipping point “will insure the ghettoization of the area”); and Blackshear Residents Org. v. Hous. Auth’y, 347 F. Supp. 1138, 1141 (W.D. Tex. 1972) (describing how public housing units in black, Hispanic, and white areas of Austin had racial majorities corresponding to their locations).} If minorities apply to live in the public housing in disproportionate numbers (as is usually the case), then its siting worsens, or at least does not improve, existing segregation. My home city of Chicago aptly illustrates this scenario of public housing placement giving rise to liability. In litigation that spanned decades\footnote{201 The culmination of the litigation was the Supreme Court’s decision in Hills v. Gautreaux, 425 U.S. 284 (1976).} and was memorialized in a well-known book,\footnote{202 See ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006).} it emerged that “substantially all of the sites for family public housing selected by [the Chicago Housing Authority] . . . were located ‘within the areas known as the Negro Ghetto.’”\footnote{203 Hills, 425 U.S. at 286.} The Supreme Court not only upheld the Seventh Circuit’s holding that the law had been violated, but also sustained its order that sweeping metropolitan area-wide relief be granted.\footnote{204 See id. at 296-306.}

A third FHA theory is that a federal agency (typically HUD) has failed “affirmatively to further the [statute’s] purposes.”\footnote{205 42 U.S.C. § 3608(d); see also Affirmatively Furthering Fair Housing Final Rule, ___ Fed. Reg. ___ (July 8, 2015) (new HUD regulation specifying local jurisdictions’ responsibilities for promoting integration).} Since integration is one of these purposes, liability may follow from persistent segregation that the government has not tried sufficiently to reduce.\footnote{206 For other examples of inadequate desegregative effort leading to liability, see NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (HUD not pursuing desegregation with sufficient vigor in Boston metropolitan area); and Shannon v. U.S. Dep’t of Hous. & Urban Dev., 436 F.2d 809, 822 (3d Cir. 1970) (same in Philadelphia metropolitan area). Section 3608(d) itself does not create a private right of action; rather, it enables claims under the Administrative Procedure Act that a federal agency has behaved arbitrarily or capriciously. See NAACP, 817 F.2d at 157-60.} A high-profile case of inadequate desegregative effort arose in the 2000s in the Baltimore metropolitan area, where most blacks live in the city and most whites live in the adjoining county.\footnote{207 See Thompson v. United States Dep’t of Hous. & Urban Dev., 348 F. Supp. 2d 398, 406 (D. Md. 2005).} Throughout the 1990s, HUD located public housing units almost exclusively in the city and distributed Section 8 vouchers that also were used primarily within the city limits.\footnote{208 See id. at 460.} HUD’s failure to consider regional responses to segregation amounted to a lack of affirmative furtherance of the FHA’s goals.\footnote{209 See id. at 458-64.} As the court concluded, “It is high time that HUD live up to its statutory...
mandate . . . and thus consider regional approaches to promoting fair housing opportunities."

Lastly, with respect to remedies, severe segregation has justified aggressive policy responses by both courts and local governments. Bold steps that otherwise might have raised legal hackles have been countenanced as the only way to achieve integration. The courts’ orders that hundreds of public housing units be built in heavily white neighborhoods in Yonkers, and that thousands of black families be given Section 8 vouchers in order to move to heavily white Chicago suburbs, are good examples of forceful judicial intervention. Both orders were upheld on appeal, even though they relied explicitly on race in an era in which such means were disfavored.

At the local government level, probably the most famous case of an unorthodox remedy being imposed (and then sustained) is the New York City Housing Authority’s decision in the 1970s to limit the share of minority residents in a Lower East Side public housing development. The Authority worried that, without this occupancy quota, the development would become “a non-white ‘pocket ghetto’” that would induce “white residents to take flight,” thus “leading eventually to non-white ghettoization of the community.” The Second Circuit approved the quota, reasoning that the Authority’s “obligation to act affirmatively to achieve integration” outweighed the harm of “prevent[ing] some members of a racial minority from residing in publicly assisted housing.” To avoid exceeding the local tipping point, that is, desegregation took priority over antidiscrimination.

Given that integration is one of the FHA’s fundamental goals, it may not be surprising that the statute is intertwined so tightly with racial groups’ residential patterns. The extent of these ties, though, has not been grasped previously. At every stage in an FHA case—standing, liability, and remedy—the existence of segregation makes it markedly easier for plaintiffs to satisfy their burdens. More importantly, as I argue next, rising integration has the opposite effect. It causes each FHA element to become considerably more difficult to establish. This thesis already is more than conjecture, as the ensuing cases illustrate. And the problems for FHA claimants posed by desegregation only can be expected to intensify as racial separation continues to decline.

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210 Id. at 463.
213 See supra notes 211-212.
214 See Otero v. New York City Hous. Auth., 484 F.2d 1122, 1128 (2d Cir. 1973) (describing actions taken by Authority to achieve 60% white-40% nonwhite resident makeup at development). These actions were not taken in response to FHA litigation; rather, they are what prompted the (unsuccessful) suit. For another New York City example of a racial occupancy quota being upheld where necessary to prevent tipping, see Daubner v. Harris, 514 F. Supp. 856, 868 (S.D.N.Y. 1981) (approving such policy at Chelsea public housing development).
215 Otero, 484 F.2d at 1124.
216 Id. at 1133-34.
B. Complication

Start again with standing. Just as it is a cognizable injury to live in a neighborhood that is segregated (or segregating) because of a defendant’s actions, a plaintiff who lives in a stably integrated area has not been harmed. She has not been deprived (nor faces any risk of deprivation) of the “social and professional benefits” that come from interracial contact.\footnote{Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111 (1979).} For instance, the northern half of the Upper West Side was one of New York City’s few integrated communities in the 1980s.\footnote{See Strykers Bay Neighborhood Council v. City of New York, 695 F. Supp. 1531, 1542 (S.D.N.Y. 1988) (citing Census statistics showing that “the renewal area historically has been a well integrated neighborhood and has become more integrated over time”).} It was just over 60% white in this period, a level largely unchanged from earlier decades.\footnote{See id.} In litigation challenging a proposed luxury development on FHA grounds, the court therefore held that the plaintiffs lacked standing. “[I]t is clear that plaintiffs have not suffered any loss of associational benefits. Indeed, their opportunities to derive the benefits of living in an integrated neighborhood have increased over the years.”\footnote{Id. at 725 (Wellford, J., dissenting) (internal quotation marks omitted). On appeal, the Sixth Circuit held that the plaintiff had standing because Cleveland Heights’s “steering policies stigmatize him as an inferior member of the community;” \textit{Id.} at 722. The majority noted the plaintiff’s associational argument for standing, and then explicitly declined to address it. \textit{See id.} at 724.}

Similarly, Cleveland Heights is a Cleveland suburb that (unlike Parma) implemented several policies in the 1970s to promote integration.\footnote{See Smith v. City of Cleveland Heights, 760 F.2d 720, 721 (6th Cir. 1985) (describing city’s policies of maintaining integration by “steering white home buyers to the Cleveland Heights housing market and black home buyers away from the area”).} As a result, it became a “racially integrated community” with a population that was roughly 75% white and 25% black.\footnote{Id. at 725 (Wellford, J., dissenting) (internal quotation marks omitted). On appeal, the Sixth Circuit held that the plaintiff had standing because Cleveland Heights’s “steering policies stigmatize him as an inferior member of the community;” \textit{Id.} at 722. The majority noted the plaintiff’s associational argument for standing, and then explicitly declined to address it. \textit{See id.} at 724.} In a lawsuit alleging racial steering by the town, the court ruled that a minority plaintiff who resided in Cleveland Heights did not have standing. “[H]e has not lost any of the social benefits of interracial living in his neighborhood. Hence, he is prevented from establishing standing.”\footnote{City of Joliet v. Mid-City Nat’l Bank of Chicago, 2014 WL 4667254, at *23 (N.D. Ill. Sept. 17, 2014).}

Next take the disparate treatment theory of FHA liability. In the same way that segregated residential patterns support an inference of invidious intent, integrated patterns suggest the opposite conclusion. A defendant in an integrated area certainly could aim to discriminate or to segregate—but these motives are both less likely and harder to prove in the absence of racial separation. A recent case from Joliet, a suburb of Chicago, highlights the obstacles that integration presents for disparate treatment claims. Joliet is a “very diverse city,” about 53% white, 28% Hispanic, and 16% black as of the 2010 Census.\footnote{See id. at *4-9.} In the mid-2000s, Joliet decided to use its eminent domain power to acquire, and then close, a large low-income development occupied mostly by minorities.\footnote{City of Joliet v. Mid-City Nat’l Bank of Chicago, 2014 WL 4667254, at *23 (N.D. Ill. Sept. 17, 2014).} Because the dislocated tenants were expected to remain in the city, the development’s closure
was predicted to improve (or at least not worsen) existing integration. The court thus decided that “this circumstantial evidence . . . cannot support the conclusion that Joliet possesses a discriminatory intent.”

Likewise, University Oaks is a neighborhood of Houston that, in the 1980s, was “highly integrated with [a] minority population estimated at nearly 50% of the residents.” The area’s homeowners voted to renew property deeds that contained restrictive racial covenants entered into half a century earlier. In an FHA suit brought by the Department of Justice, the court relied on the “present composition of the community” to hold that the homeowners “had no intent whatsoever to discriminate on the basis of race.” The community’s status as an “integrated model community” offset the more negative deductions about intent that followed from the covenants’ extension.

The impact of integration on the disparate impact theory of FHA liability is even starker. If residential patterns are integrated and likely to remain so, then it is very difficult for segregation to be “create[d], increase[d], reinforce[d], or perpetuate[d].” The basic prerequisite for this kind of FHA violation—a practice that maintains or worsens existing segregation—is absent. Recall from earlier that a disparate impact typically is found when a municipality either uses zoning to prevent low-income developments from being built or restricts public housing to minority-heavy areas. Neither of these scenarios is plausible in the face of integration.

For example, in a recent case from Fulton County, a suburban region near Atlanta, the plaintiffs challenged the county’s refusal to rezone property where they hoped to construct a low-income development. This property was in a “tract with 54% black population” that bordered another tract that was 42% black. The court denied the claim, reasoning that “[i]n the absence of the [proposed] development the South Fulton County area likely will remain a racially mixed, predominantly African-American area, just as it was previously.” Similarly, in a case from the 1990s, the plaintiffs complained

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226 See id. at *23 (noting that “relocation of 240 [development] families . . . cannot be reasonably believed to affect the overall demographics of Joliet”).
227 Id.; see also id. at *17 (“[T]he demographic statistics presented by the parties is conclusive evidence that Joliet does not intend to discriminate against African–Americans . . . .”)
229 See id. at 1472. However, the homeowners also took steps to reduce the covenants’ effects. See id.
230 Id. at 1473.
231 Id.; see also id. at 1475 (commenting that “a highly integrated community . . . is hardly characteristic of the perpetrators of discrimination that the Fair Housing Act has focused upon”). For another example of integration mitigating against a finding of invidious intent, see Heights Cnty. Congress v. Hilltop Realty, Inc., 774 F.2d 135, 143 (6th Cir. 1985) (finding that realtor lacked segregative motive when he circulated solicitation cards to homeowners in “transitional” neighborhood in Cleveland Heights).
232 24 C.F.R. § 100.500(a). The case law has not yet confronted practices that increase segregation, but are undertaken in areas that are largely integrated. When disputes involving such practices emerge, courts will have to decide if all segregative practices are presumptively unlawful, or only those adopted in segregated areas.
233 See supra notes 197-204 and accompanying text.
235 Id. at 1371.
236 Id. at 1383; see also Hallmark Devel., Inc. v. Fulton Cty., 466 F.3d 1276, 1288 (11th Cir. 2006) (“[T]here is no evidence that South Fulton is currently segregated and that Hallmark’s development would end that segregation.”).
about the location and volume of public housing in Islip, a suburb of New York City.\textsuperscript{237} Islip was integrating rapidly in this period, with the share of its black population living in heavily black tracts falling from 91\% to 69\% over a decade.\textsuperscript{238} This integrative trend helped convince the court that "[t]he evidence presented with regard to the Town's housing policies . . . fail[s] to establish any segregative effect."\textsuperscript{239}

Lastly, as to remedies, integration reduces both the need for aggressive measures by courts and municipalities and the likelihood that they will be upheld in litigation. The best evidence of reduced need is indirect. There are very few cases in recent years of courts granting relief on the scale of the 1980s Yonkers and Chicago orders, which led to thousands of black families moving to white areas at public expense.\textsuperscript{240} There also are "virtually no new [public housing quotas] in this period and thus litigation involving such programs has ceased."\textsuperscript{241} The only reason for these quotas was to prevent neighborhoods from tipping.\textsuperscript{242} As the danger of tipping has receded, so has the impetus to adopt these policies.

The legal vulnerability of forceful remedies is illustrated nicely, in the context of a court order, by a Dallas case from the 1990s. Like the Yonkers and Chicago courts, the Dallas court held that the local housing authority had perpetuated segregation by restricting public housing to minority-heavy areas.\textsuperscript{243} Also like those courts, it then instructed the authority to build thousands of new public housing units in white neighborhoods.\textsuperscript{244} But on appeal, this order was deemed a violation of the Equal Protection Clause. Because Dallas was desegregating, thanks in part to the "relative success of [the authority] in moving blacks into white areas via its Section 8 program," the "district court's race-conscious site selection criterion" was not "necessary to remedy the effects of past discrimination."\textsuperscript{245}

\begin{footnotes}
\item[238] See id. at *1.
\item[239] Id. at *12. The court also noted that some of the public housing erected by Islip had an integrative effect. See id. at *12-13. Two more examples of disparate impact claims failing in integrated areas come from the Upper West Side of New York City. See Strykers Bay Neighborhood Council v. City of New York, 695 F. Supp. 1531, 1542 (S.D.N.Y. 1988) (rejecting disparate impact claim against proposed luxury development); Trinity Episcopal Sch. Corp. v. Romney, 387 F. Supp. 1044, 1073 (S.D.N.Y. 1974), aff'd in part, rev'd in part, 523 F.2d 88 (2d Cir. 1975) (same against proposed low-income development). And Artisan/American Corp. v. City of Alvin, 588 F.3d 291 (5th Cir. 2009), is a case remarkably similar to Hallmark, with the court rejecting a disparate impact challenge to a city's denial of a permit for a low-income development due to lack of "evidence that minorities lived in particular areas of town, or that the project would exacerbate such a trend, if it existed." Id. at 299 n.20.
\item[240] See supra notes 211-213 and accompanying text. As discussed below, one similarly aggressive court order, in Dallas in the 1990s, was declared unlawful on appeal. See infra notes 243-245 and accompanying text.
\item[241] SCHRUMM, supra note 6, at § 11A:2.
\item[242] See Rodney A. Smolla, In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980s, 58 S. CAL. L. REV. 947, 989 (1985) ("The only reason that racial occupancy controls are needed is that without them too many whites . . . find themselves overwhelmed by fear and bias when faced with . . . substantial numbers of black neighbors.").
\item[243] See Walker v. City of Mesquite, 169 F.3d 973, 976 (5th Cir. 1999) ("The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation.").
\item[244] See id. at 977 (describing court order).
\item[245] Id. at 984; see also id. (noting that "number of Section 8 black families living in predominantly white areas increased by . . . 27\%" in two-year period).
\end{footnotes}
Analogously, courts in the 1980s struck down racial occupancy quotas used by public housing developments in Charlottesville, New York City, and Pittsburgh. The problem with all of these policies was the same. In areas that were integrating, slowly but surely, there was insufficient evidence that the quotas were necessary to prevent tipping. As the court observed in the Pittsburgh case, the development had remained “located in an integrated section” even as the “percentage of minority occupancy in the [development] had increased.” The housing authority thus was unable to prove that “existing integration . . . would be destroyed absent a restriction on the number of minorities permitted to reside in public housing.”

But while it is clear that integration complicates several aspects of FHA doctrine, two caveats should be noted here. First, integration has little bearing on claims that are based on discrimination rather than segregation. It is perfectly possible for landlords, realtors, housing authorities, and other parties to discriminate in housing transactions even as residential patterns become less racially separated. And second, the case for the disruptive effects of integration is stronger in theory than in practice (at least to date). Compared to the many instances in which segregation has facilitated the imposition of liability and potent remedies, the number of suits in which integration has had the opposite consequences remains modest.

How come? The most likely explanation is that the national decline in segregation is too recent (and too geographically uneven) to have manifested itself fully in the FHA case law. Until not long ago (and to this day in several metropolitan areas), segregation was not low enough to be a hindrance rather than a boon for plaintiffs. Another possibility is that FHA suits are filed at higher rates in segregated areas than in integrated ones. Self-selection of this sort could cause the courts’ perception of American residential patterns to diverge from the empirical reality.

But whatever the reason for the relatively low volume of FHA cases grappling with desegregation, the key points here are conceptual and prospective. Desegregation does make it harder for plaintiffs to show standing, to establish liability, and to win sweeping remedies. And these obstacles are likely to loom larger in the future, as the country continues to integrate. Below, I discuss what these points mean for the FHA as a whole. My view is that they may prompt the


247 Id. at 765; see also Charlottesville, 718 F. Supp. at 466 n.8 (“CRHA has not demonstrated that a [tipping] demographic similar to the situation in Otero exists in the instant matter.”); Starrett City, 660 F. Supp. at 678 (noting “wide elasticity of [tipping], which ranged ‘from a low of 1% black to a high of 60% black’”).

248 But see Galster, supra note 111, at 113 (finding that volume of housing discrimination and segregation are linked, and thus implying that there may be less discrimination if segregation is lower).

249 Notably, I am unaware of any affirmative furtherance claims under 42 U.S.C. § 3608(d) that have failed on the ground that desegregating residential patterns show that HUD has pursued integration with sufficient vigor.
statute’s reorientation from desegregation to antidiscrimination—and that this shift in focus would be, for the most part, desirable.

C. Conciliation

I begin on the bright side. If the elements of a cause of action aimed at bringing about “integrated and balanced living patterns” are now trickier to prove—because these patterns are now more prevalent—then congratulations are in order for a significant civil rights victory. The growing problems faced by certain FHA plaintiffs are a sign that one of the statute’s key objectives, desegregation, is closer to being achieved. Diminished activity, heading eventually toward dormancy, is exactly what we should want for provisions combating an evil that gradually is fading from the American residential landscape.

This optimism extends to the FHA’s antidiscrimination project. As discussed earlier, discrimination is a major driver of segregation because it can prevent minorities from being able to live in their preferred neighborhoods. The available evidence also indicates that discrimination is decreasing, and so helping to propel the decline in segregation. Under these conditions, we might expect (and applaud) a lower frequency of, and success rate for, housing discrimination claims. And indeed, this seems to be what is happening. Michael Schill reports that “blatant forms of discrimination are becoming less common” in complaints filed with HUD. Likewise, Stacy Seicshnaydre finds that plaintiffs’ odds of winning FHA appeals fell from 100% in the 1970s to 47% in the 1980s, 13% in the 1990s, and only 8% in the 2000s. This trend could reflect changing judicial attitudes, but it also could signify that the FHA’s other bête noire is becoming rarer too.

However, there remain reasons for wariness even in light of this encouraging picture. With respect to the FHA’s desegregative side, it would not be impossible for segregation levels to rise in coming years, say if another economic crisis were to destabilize integrating neighborhoods. This sort of shock would raise the profile of doctrinal elements linked to segregation and make them easier for

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252 See supra notes 98-100 and accompanying text.
253 See supra notes 101-113 and accompanying text.
256 See Richard H. Sander, Housing Segregation and Housing Integration: The Diverging Paths of Urban America, 52 U. MIAMI L. REV. 977, 1009 (1998) (also concluding that FHA “was, at least, partly successful in its principal goal of attacking market discrimination”).
257 See supra notes 149-152 and accompanying text (discussing how foreclosure crisis of late 2000s modestly increased segregation).
plaintiffs to establish.\footnote{See id. at 68 (showing decline in housing discrimination since 1977); \textit{see also} SCHWEMM, supra note 6, at \S 11A:1 (noting that “housing providers—particularly landlords—continue to violate [FHA] at an astonishing rate”); Robert B. Avery et al., \textit{New Information Reported Under HMDA and Its Application in Fair Lending Enforcement}, 2005 FED. RESERVE BULLETIN 344, 376, 379 (finding that blacks are denied housing loans at higher rates than whites, and given worse loan terms, even controlling for array of non-racial factors).} In addition, even in a generally integrating society, specific actions may well be taken with segregative intent or have a segregative effect. The law should remain watchful for these actions, not overlooking them due to the overall rise in integration.

The need for vigilance is even greater with respect to the FHA’s antidiscrimination half. Housing discrimination may be declining, and it may no longer be the main determinant of racial groups’ residential patterns, but it still occurs far too often. Notably, the most recent HUD survey concluded that about 9\% of black renters and 13\% of black homebuyers are told about fewer available units than their white peers.\footnote{See id. at 10:2 (noting frequency of these cases); \textit{see also id.} at \S 13:2 (describing typical antidiscrimination claims).} Roughly 3\% of black renters and 9\% of black homebuyers also are shown fewer units.\footnote{See Robert G. Schwemm, \textit{Discriminatory Effect and the Fair Housing Act}, 54 NOTRE DAME L. REV. 199, 262 (1978) (characterizing “the ‘big’ private housing case” as one aimed at achieving “the congressional goal of an open, integrated society”), \textit{but see} Shanna L. Smith, \textit{the National Fair Housing Alliance at Work, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY} 237, 247-48 (Robert D. Bullard et al. eds., 1994) (listing major antidiscrimination victories under FHA).} These rates are substantially lower than in earlier eras, but they still imply that hundreds of thousands of FHA violations take place each year.\footnote{\textit{See id. note 6 at xiv-xvi.}} The struggle against discrimination clearly has not yet been won.

This analysis suggests that the FHA may operate somewhat differently in the future than it has to date. Historically, many landmark cases involved desegregation in some capacity. The Supreme Court’s leading encounters with the statute addressed standing in segregated areas and disparate impact claims based on the furtherance of segregation.\footnote{\textit{See SCHWEMM, supra note 6, at \S 11A:1 (noting that “housing providers—particularly landlords—continue to violate [FHA] at an astonishing rate”); Robert B. Avery et al., \textit{New Information Reported Under HMDA and Its Application in Fair Lending Enforcement}, 2005 FED. RESERVE BULLETIN 344, 376, 379 (finding that blacks are denied housing loans at higher rates than whites, and given worse loan terms, even controlling for array of non-racial factors).} In the lower courts too, “the most common type” of disparate impact decision dealt with “exclusionary zoning . . . challenged on the ground that it perpetuates housing segregation.”\footnote{\textit{See id. note 6 at xiv-xvi.}} By contrast, antidiscrimination cases, while abundant, were relatively small-bore.\footnote{\textit{See id. note 6 at xiv-xvi.}} They implicated fewer parties, had less dramatic consequences, and did not set off the same judicial fireworks.

Going forward, though, antidiscrimination is likely to be where the action is. In a more integrated environment, segregation should not be as grave of a concern, and there should not be as much for the FHA’s desegregative provisions to do. These provisions still should have \textit{some} utility, serving as a prophylactic in case segregation rises again as well as a weapon against lingering segregative
practices. But their potency should be lower than in previous periods. On the other hand, even in an integrating society, housing discrimination probably will persist at levels necessitating substantial litigation. Landlords will continue refusing to rent to minorities, realtors will keep steering homebuyers to different neighborhoods, and so on. The resulting antidiscrimination suits still may be small-bore, at least compared to the earlier battles over desegregation. But odds are they will be, if not the only game in town, at least the most important one.266

On balance, I find appealing this account of how the FHA eventually might function. Less would be asked of the statute, especially in terms of desegregation. But less would be needed, given the ongoing declines in both racial separation and discrimination. Instead of fighting endlessly in the trenches, the law might evolve into a sort of tactical reserve, intervening at times to preserve existing gains and quell new uprisings. This is not a heroic vision, but we are gradually moving toward an America that may not require a heroic FHA.

III. VOTING RIGHTS ACT

The next civil rights statute I address is the Voting Rights Act—in particular, its core operative provision, Section 2, which bans racial vote dilution.267 The VRA does not have as obvious a relationship as the FHA with racial groups’ residential patterns. Why, after all, should the fate of a vote dilution claim hinge on the segregation of a minority population? The answer cannot be found in the law itself. It lies, instead, in the doctrine the courts have devised to apply the VRA. The Supreme Court has held that there can be liability only if a minority group is geographically compact—that is, segregated. The Court also has required proof of racial polarization in voting. Polarization is conceptually distinct from segregation, but as a methodological matter, it is easier to show under segregated conditions. And for their part, the lower courts have added racial separation to the list of factors that may be considered at the totality-of-circumstances stage of the analysis.

As in the FHA case, integration interferes with all of these elements. By definition, an integrated minority group is not geographically compact, and so cannot prevail in a VRA challenge. Polarization also may exist in an integrated area, but the techniques typically used to estimate it are unreliable in this setting. At the totality stage too, integration weighs against a finding of liability. But unlike in the FHA case, these implications are cause for concern, not contentment. One of the VRA’s goals is minority representation, and this aim is directly threatened by desegregation. Fortunately, the danger here is doctrinal rather than statutory, and so could be dispelled by judicial rather than legislative action. To enable the VRA to play its proper role, the courts could eliminate the

266 I reiterate my earlier point that antidiscrimination suits under the FHA include both disparate treatment and disparate impact claims. See supra note 173.
267 See 52 U.S.C. § 10301. The VRA’s other key component, Section 5, effectively was nullified in Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).
compactness requirement, permit polarization to be shown using new methods, and authorize remedies other than single-member districts.

A. Connection

Enacted in 1965 and substantially amended in 1982, Section 2 of the VRA now prohibits what is known as racial vote dilution: state action, short of outright disenfranchisement, that makes it more difficult for minority voters to elect their preferred candidates. Specifically, the provision forbids any “practice[] or procedure . . . which results in a[n] . . . abridgement of the right . . . to vote on account of race or color.” A violation is established if, “based on the totality of circumstances, it is shown that . . . members [of a minority group] have less opportunity than other members of the electorate . . . to elect representatives of their choice.” Section 2 also states that the “extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.”

A careful reader may notice that the statutory text does not mention compactness, polarization, or racial separation. This observation is accurate. These concepts are part of Section 2 law not because they are recognized by the provision itself, but rather because courts have inserted them into the doctrine. This insertion occurred most famously in the Supreme Court’s 1986 decision, Thornburg v. Gingles, its first interpreting the amended statute. The Court held that there are three “necessary preconditions” for liability in vote dilution suits. First, the “minority group must be . . . sufficiently large and geographically compact to constitute a majority in a single-member district.” Second, the group must be “politically cohesive.” And third, the “white majority [must] vote[] sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” If these criteria are met, the final analytical step is a

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268 Section 2 also prohibits outright disenfranchisement. See id. § 10301(a) (banning “denial . . . of the right . . . to vote on account of race or color”); id. § 10301(b) (provision is violated if minority “members have less opportunity than other members of the electorate to participate in the political process”); see also Nicholas O. Stephanopoulos, The South After Shelby County, 2013 SUP. CT. REV. 55, 106-18 (discussing application of Section 2 and Section 5 of VRA to vote denial claims). Unlike vote dilution, vote denial is not connected to racial groups’ residential patterns, and so I do not discuss it further.

269 Id. § 10301(a).

270 Id. § 10301(b).

271 Id.

272 478 U.S. 30 (1986); see also Daniel P. Tokaji, Realizing the Right to Vote: The Story of Thornburg v. Gingles 27 (Aug. 21, 2015) (“[W]hat is perhaps most surprising about the backstory to Gingles is that its now-canonical test for vote dilution did not appear in any of the briefs, the oral argument, nor even in the first draft of Justice Brennan’s opinion. . . .”).

273 Gingles, 478 U.S. at 50.

274 Id.

275 Id. at 51.

276 Id.
totality-of-circumstances inquiry focused on the nine factors identified by the Senate report that accompanied Section 2’s revision in 1982.\textsuperscript{277}

Of these elements, the one that is linked most directly to racial groups’ residential patterns is \textit{Gingles}’s first prong, geographic compactness. To require a group to be geographically compact before liability may be imposed, in essence, is to require it to be residentially segregated. That the Court conceived of compactness and segregation as largely synonymous is clear from its decision. At various points, it referred to the minority voters who would be able to win vote dilution claims as “geographically insular” and “sufficiently concentrated.”\textsuperscript{278} It also contrasted these voters with ones “spread evenly throughout a multimember district” and “substantially integrated throughout the jurisdiction,” who would not be able to prevail.\textsuperscript{279} Commentators have pointed out the convergence between compactness and segregation as well. In Dana Carstarphen’s words, “the Court has made residential segregation a prerequisite to the protection of rights established by the Voting Rights Act.”\textsuperscript{280}

Why did the Court predicate Section 2 liability on something as seemingly unrelated as segregation? The explanation lies in the only remedy the Court contemplated for violations of the provision: the creation of single-member districts. If a minority group is segregated, a district easily can be drawn around it, and the group then can elect its preferred candidate as long as \textit{Gingles}’s other criteria (sufficient size and racial polarization) are met.\textsuperscript{281} Conversely, if a group is residually \textit{integrated}, it becomes very difficult for a district to capture enough of its members to enable them to elect the candidate of their choice. To do so (where it is possible at all), a district must assume a highly irregular shape, connecting whatever local concentrations of the group happen to occur. As the Court put it, if a group is not segregated, “as would be the case in a substantially integrated [area],” then district lines “cannot be responsible for minority voters’ inability to elect [their preferred] candidates.”\textsuperscript{282}

\textsuperscript{277}See id. at 36-37 (citing Senate factors).
\textsuperscript{278}Id. at 49, 50 n.17, 64, 80 (internal quotation marks omitted).
\textsuperscript{279}Id. at 50 n.17 (internal quotation marks omitted).
\textsuperscript{281}See Nicholas O. Stephanopoulos, \textit{Our Electoral Exceptionalism}, 80 U. CHI. L. REV. 769, 844 (2013) (noting that single-member districts “can benefit only minority groups that are large and geographically dense”).
\textsuperscript{282}\textit{Gingles}, 478 U.S. at 50; see also id. at 50 n.17 (“The single-member district is generally the appropriate standard against which to measure minority group potential to elect . . . ”). The compactness requirement also might be justified on the ground that a segregated minority group is more likely to be the
Importantly, the Court was correct that segregation can increase minority representation if single-member districts are used. Two recent studies examine how a state’s index of dissimilarity (calculated for minorities and non-minorities, and for counties within the state) is related to its number of congressional majority-minority districts. Both studies find that, even controlling for minority population size, partisan control, and redistricting criteria, more segregated states tend to have more majority-minority districts. In fact, as the dissimilarity index varies from its lowest to its highest level, states form about 2.5 more districts in which minorities can elect the candidate of their choice. These results confirm that a compactness requirement is reasonable as long as Section 2 remedies are restricted to single-member districts.

Turning next to Gingles’s second and third prongs, they are tied methodologically rather than substantively to segregation. Minority political cohesion (the second prong) and white bloc voting (the third one) boil down to a single concept: racial polarization in voting. If most minorities support one candidate, and most whites back her opponent, then voting is racially polarized (and vice versa). Polarization, in turn, has no inherent connection to segregation. Racial groups can prefer different candidates while living near one another, or the same candidate while living apart. But both of the techniques typically used to measure polarization rely on segregated residential patterns. Segregation is what makes these techniques feasible.

The simpler method to calculate polarization is homogeneous precinct analysis. First, election precincts that are highly (usually over 90%) racially homogeneous are identified. Second, the results of elections involving a victim of discrimination than an integrated one—and thus in greater need of judicial protection. But this is not the Court’s own explanation for the requirement; the relationship between segregation and discrimination is far from ironclad; and polarization (the focus of Gingles’s next two steps) seems a better proxy for discrimination than segregation.

Though segregation does not necessarily increase minority representation. Clusters of minority voters also can be split by district lines, rendering the voters unable to elect their preferred candidates. See Jason Barabas & Jennifer Jerit, Redistricting Principles and Racial Representation, 4 STATE POL. & POL’Y Q. 415, 423 (2004); Carl E. Klarner, Redistricting Principles and Racial Representation: A Re-Analysis, 7 STATE POL. & POL’Y Q. 298, 299 (2007). By law, all congressional districts are represented by single members. See 2 U.S.C. § 2c.

See id. Klarner also found that more segregated states tend to have higher shares of majority-minority districts. See Klarner, supra note 284, at 299.

This is because the dissimilarity index varies from 0.33 to 0.93 and its regression coefficient is 4.41. See Barabas & Jerit, supra note 284, at 421, 423; Klarner, supra note 284, at 299.

See Gingles, 478 U.S. at 50-51.

See BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 82 (1992) (observing that polarization is “foundation for two of the three prongs of the Gingles test”).

Unlike geographic compactness, the polarization requirement does not stem from an assumption that single-member districts are the only available remedy. Polarization is necessary for there to be racial vote dilution in the first place. If a minority group is not politically cohesive, then there is no minority-preferred candidate. Similarly, if there is no white bloc voting, then there is no enduring obstacle to the election of the minority’s candidate of choice. See Gingles, 478 U.S. at 51.


See Gingles, 478 U.S. at 52, 53 n.20 (referring to “extreme case analysis” as “standard in the literature for the analysis of racially polarized voting”).

See Greiner, supra note 30, at 464 (also referring to 90% cutoff).
minority candidate of choice are compiled for these precincts. And third, these results are used to determine the extent of minority political cohesion and white bloc voting. As should be obvious, all of these steps hinge on the presence of racially homogeneous precincts—that is, segregation. Only if there exist precincts at least 90% of whose voters belong to the same race can the analysis begin. As Bernard Grofman and his coauthors comment, “if there are precincts that are overwhelmingly . . . composed of members of the same race, one can be extremely confident of the voting behavior of members of that group.”

The more advanced approach to estimating polarization is ecological regression (of which there exist still more sophisticated variants, such as King’s ecological inference). All precincts, not only racially homogeneous ones, are used by this technique. The share of the vote received by the minority-preferred candidate in each precinct then is regressed on each precinct’s minority population share. The fit of this regression indicates how well electoral preferences are explained by race, while the 0% and 100% intercepts denote the levels of minority political cohesion and white bloc voting.

Again, this procedure works best when most voters in most precincts belong to the same race. Under these conditions, impossible conclusions (for instance, that 110% of black voters support the black candidate of choice) are rare. The impact of the ecological fallacy, which points out that individuals’ preferences cannot be ascertained using group-level data, is reduced too. The procedure also is most tenable when voters belong to precisely two races. Then the proportions that are inputted into the model do not hide the presence of other racial groups, and valuable information about voting and demography is not sacrificed. Ecological regression thus depends on not only a segregated society, but also a biracial one.

Lastly, recall that Gingles’s final step is a totality-of-circumstances inquiry in which the nine Senate factors take center stage. Racial separation is not one of these factors, but numerous lower courts nevertheless have added it to the list of

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293 For example, if a precinct is 95% black and 5% white, and a minority candidate of choice wins the precinct by a margin of 85% to 15%, then the candidate must have won between 84% and 89% of the black vote. This is a very narrow (and thus very useful) range of possible minority cohesion scores.

294 Strictly speaking, what is necessary here is a high score on the isolation index, indicating that most minority members live in minority-heavy neighborhoods.

295 Grofman et al., supra note 288, at 85; see also Greiner, supra note 30, at 464 (“[I]f one racial group dominates . . . then the observed vote totals in that precinct can be safely attributed to this racial group alone . . . ”).

296 See Gingles, 478 U.S. at 52-53 & n.20 (also referring to “bivariate ecological regression analysis” as “standard in the literature for the analysis of racially polarized voting”); see also Grofman et al., supra note 288, at 82-105; Gary King, A Solution to the Ecological Inference Problem (1997).

297 See Greiner, supra note 30, at 464 (“Without the bounds to constrain the numbers, impossible results can (and often do) occur.”).

298 See Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the VRA After Shelby County, 115 Colum. L. Rev. (forthcoming 2015) (manuscript at 14) (commenting that ecological regression “works reasonably well when . . . precincts are racially homogenous”).

299 See Greiner, supra note 28, at 157 (“[E]cological regression is especially problematic when applied to precinct tables of size larger than two by two.”); Greiner, supra note 30, at 465-67.

300 For an exhaustive list of cases relying on both homogeneous precinct analysis and ecological regression, generally under segregated conditions, see Greiner, supra note 28, at 155-57.

301 See Gingles, 478 U.S. at 36-37.
items that should be considered. For example, one court observed that South Carolina’s “Charleston County remains to a large extent separated along racial lines.” The area’s segregation weighed in favor of Section 2 liability because it “hinder[ed] the ability of African-American candidates to solicit the votes of white voters.” Similarly, another court noted the high black-white dissimilarity index of Euclid, Ohio. Here too, “racial separation in Euclid’s housing . . . serve[d] to hamper the ability of African–American candidates to fully engage the predominately white electorate.”

To be sure, not all of Section 2 revolves around segregation. Gingles’s first prong also implicates the size of the minority population and the shape of the district that could be drawn around it. As a substantive matter, the second and third prongs involve racial groups’ electoral preferences, not their residential patterns. And the nine Senate factors do not even refer to racial separation (though they do emphasize one of its key causes, discrimination). Still, it seems undeniable that segregation plays a substantial (if not exclusive) role at each Section 2 stage. Next, I show how these functions are compromised by rising integration. Both in theory and in practice, integrated minority groups face serious obstacles in winning vote dilution challenges.

B. Complication

The problems posed by integration are clearest with respect to Gingles’s first prong. Minority voters who are residentially integrated are the very opposite of a geographically compact group. In the Court’s terminology, they are diffuse rather than “insular,” dilute rather than “concentrated.” Accordingly, they cannot prevail under Section 2 because they fail one of the Court’s “necessary preconditions” for liability. As Richard Briffault puts it, “Where minorities are residentially scattered . . . it [is] difficult to create [the] majority-minority districts” assumed by Gingles to be the only available remedy for vote dilution.

The Court confronted “largely integrated communities” of Houston-area blacks and Hispanics in an important 1996 case. The plaintiffs argued that Section 2 required “two of the three least regular districts in the country” to be

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304 Id.
306 Id. at 613.
308 See id. at 51.
309 See id. at 36-37 (factors include “any history of official discrimination” and “extent to which members of the minority group . . . bear the effects of discrimination”).
310 Id. at 49, 50 n.17, 64, 80 (internal quotation marks omitted).
311 Id. at 50.
312 Richard Briffault, Lani Guinier and the Dilemmas of American Democracy, 95 COLUM. L. REV. 418, 430 (1995); see also Carstarphen, supra note 280, at 410 (“Gingles makes it difficult for residentially dispersed minorities to obtain a remedy for vote dilution . . . .”); Karlan, supra note 280, at 89.
constructed, one with a black majority and the other with a Hispanic majority. In the lower courts, a notable case of an integrated group failing to satisfy Gingles’s first prong arose in Louisiana in the 1980s. Blacks in Jefferson Parish were “dispersed widely” with small black clusters scattered throughout the region. The only district that could enclose a black majority “contain[ed] no less than 35 sides” and crossed the “major natural boundary” of the Mississippi River. The court therefore held that the black population was not “sufficiently compact” and that the plaintiffs’ proposed district was not “an acceptable remedy to the vote dilution.”

Moreover, not only can integrated minority voters not comply with Gingles’s first prong, but if a district nevertheless is drawn around them, it is likely to be unconstitutional. Under the Court’s racial gerrymandering doctrine, a district is unlawful if “race was the predominant factor motivating” the district’s formation. Race often has been found to be the predominant motive where scattered minority voters were corralled within the same odd-looking district. For instance, the Court invalidated the Houston-area districts noted above, in part because they “connect[ed] dispersed minority populations” and “capture[d] pockets of Hispanic residents.” Similarly, in another landmark 1996 case, the Court struck down an elongated North Carolina district that enclosed the “relatively dispersed” black population in the state’s center. In the Court’s view, a district including “individuals who belong to the same race, but who are otherwise widely separated by geographical . . . boundaries . . . bears an uncomfortable resemblance to political apartheid.”

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314 See id. at 973 (plurality opinion).
315 Id. at 980.
317 See id. at 1007.
318 Id. For additional examples of integrated minority groups failing to comply with Gingles’s geographic compactness requirement, see Shaw v. Hunt, 517 U.S. 899, 916 (1996) (Shaw II) (“No one looking at District 12 could reasonably suggest that the district contains a ‘geographically compact’ population of any race.”); and Potter v. Wash. Cty., 653 F. Supp. 121, 129 (N.D. Fla. 1986) (finding no geographic compactness where black population was “dispersed throughout Washington County”).
321 Shaw v. Reno, 509 U.S. 630, 634 (1993) (Shaw I); see also Shaw II, 517 U.S. at 918 (invalidating this district).
322 Shaw I, 509 U.S. at 647. The converse of this proposition is true as well: Districts enclosing segregated minority populations are unlikely to be unconstitutional, because they usually can be justified on non-racial grounds such as compactness and respect for communities of interest. See, e.g., Lawyer v. Dep’t of Justice, 521 U.S. 567, 581 (1997) (upholding Tampa Bay district that “comprise[d] a predominantly urban, low-income
Next, with respect to Gingles’s second and third prongs, integration presents technical rather than substantive hurdles. If there are few racially homogeneous precincts in an area, analyses requiring such precincts can be conducted only with difficulty. Reliable inferences about racial groups’ electoral preferences cannot be drawn from precincts with diverse populations. Likewise, ecological regression is less accurate when minorities and whites live in more integrated patterns. The confidence bounds of the method’s estimates increase, impossible results are more common, and the impact of contestable assumptions grows. As James Greiner explains, “current circumstances, particularly an increasingly melting-pot United States polity, now challenge these techniques [for measuring polarization] in new ways.”

These concerns are more than merely academic. In a 1980s case from California, there was a “dispersion of Hispanics and blacks throughout the City of Pomona.” As a result, the court rejected the plaintiffs’ estimates of minority political cohesion and white bloc voting. “Their homogenous precincts analysis is inappropriate because, due to the dispersion of minorities . . . there are no homogenous precincts that are 90 to 100% of one race.” Similarly, in a recent case from Alabama, Hispanics and Native Americans were substantially integrated throughout the state. Here too, the court declined to credit the plaintiffs’ allegations about polarization because there was an “insufficient concentration of Native Americans or Hispanics . . . for ecological regression analysis.”

Lastly, just as the presence of racial separation may weigh in favor of liability at the totality-of-circumstances stage, its absence may point in the opposite direction. In a striking 2000s case from Colorado, the court found that all of the Gingles factors likely were satisfied. The court nevertheless upheld the at-large election of Alamosa County’s commissioners, in part because of the
“extensive integration and association among Hispanic and Anglo residents.”

The court observed that “Hispanic residents now live, work, and own businesses both north and south of the [old] demarcation line,” and that “Hispanic residents . . . are not as geographically and socially isolated.” This intermingling precluded Section 2 liability, according to the court, because it showed that racial discrimination was no longer prevalent in the County.

As with the FHA, these examples of Section 2 claims being undercut by integration are rarer than the reverse scenario—namely, Section 2 claims being bolstered by segregation. As before, the relative dearth of the former cases probably is attributable to the recency of America’s desegregative trend, as well as strategic decisions by plaintiffs to file suit in areas that remain segregated. And again, the key points for present purposes are that integration does complicate each Section 2 element, and that these problems are likely to worsen as the country desegregates further. Below, I discuss the operation of Section 2 under more integrated conditions. I explain how the doctrine construing the provision could be amended to allow it to continue promoting minority representation.

C. Conciliation

I was mostly sanguine earlier about the FHA’s future role for one simple reason: The statute aims to bring about “integrated and balanced living patterns.” Since residential segregation has been falling and probably will keep falling, the law is progressing toward the achievement of one of its core objectives. Unfortunately, such optimism is not in order for Section 2. Integration is not one of Section 2’s goals. But minority representation is one of them, and for all of the reasons discussed above, it is imperiled by desegregation. Lawsuits making possible the election of minority-preferred candidates become ever harder to win as minority voters grow ever more dispersed.

That Section 2 seeks (among other things) to improve minority representation is clear from the statutory text itself. The provision emphasizes minority voters’ “opportunity . . . to elect representatives of their choice.” It also provides that the “extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.” The legislative history confirms this purpose. One of the Senate factors that courts evaluate at Gingles’s totality-of-circumstances stage is the “extent to which

\[\text{References}\]

330 Id. at 1020.
331 Id. at 1020, 1035.
332 See id. at 1038.
333 See supra note 250 and accompanying text.
334 See id.
335 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (internal quotation marks omitted); see also supra Part II.C.
337 Id. Representatives of minorities’ choice are not necessarily identical to representatives who are minority members themselves. The former term refers to politicians preferred by minority voters, while the latter denotes politicians of a particular race, regardless of the support they enjoy from minority voters.
members of the minority group have been elected to public office."\textsuperscript{338} The 1982 Senate report notes as well that the “presence of minority elected officials is a recognized indicator of access to the process.”\textsuperscript{339}

It is true that minority representation is not Section 2’s only goal. The provision also tries to stop cruder practices that hinder minority voters’ access to the polls or disenfranchise them outright.\textsuperscript{340} It is true as well that minority representation is a controversial objective. Opponents of the 1982 amendments warned that the revisions would require proportionality in the election of minority officials.\textsuperscript{341} Justice Thomas famously has decried the whole concept of vote dilution as a “hopeless project” and a “disastrous misadventure.”\textsuperscript{342} And Justice Kennedy may believe that Section 2 only protects (and can ever compel) “naturally arising” majority-minority districts in minority-heavy areas.\textsuperscript{343} But these are largely dissenting voices. The prevailing view, at least in most court decisions and among most litigants, is that minority representation is indeed part of Section 2’s mission. As Lani Guinier remarks, “The belief that black representation is everything has defined litigation strategy under the Voting Rights Act.”\textsuperscript{344}

How, then, can Section 2 continue to secure minority representation in an integrating America? In fact, there are several ways, of varying potency and plausibility. First, and most intuitively, Gingles’s geographic compactness requirement could be eliminated. If minority groups did not have to be compact—that is, segregated—to establish liability, then dispersed groups would be able to prevail in vote dilution suits. Integration would not thwart them at the first step of the Gingles framework. The same point holds for remedies. If courts could order the creation of odd-looking districts containing scattered minority voters, then appropriate relief would be available for integrated plaintiffs. They would be able both to show a violation of Section 2 and to cure it.\textsuperscript{345}

\textsuperscript{338} S. REP. No. 97-417, at 207 (1982) [hereinafter 1982 Senate Report]; see also Thornburg v. Gingles, 478 U.S. 30, 48 n.15 (1986) (describing this factor as one of “the most important . . . bearing on § 2 challenges to multimember districts”).

\textsuperscript{339} 1982 Senate Report, supra note 338, at 193. And in the case law, the Supreme Court has made a minority group’s deviation from proportional representation one of the linchpins of Section 2 doctrine. See Johnson v. De Grandy, 512 U.S. 874, 892 (O’Connor, J., concurring) (“The opinion’s central teaching is that proportionality . . . is always relevant evidence in determining vote dilution . . . .”).

\textsuperscript{340} See supra note 268. It is also true that an argument can be made that Section 2 only seeks to provide representation to coherent geographic communities of minority voters. Indeed, I previously have advanced such a claim myself. See Nicholas O. Stephanopoulos, Redistricting and the Territorial Community, 160 U. Pa. L. Rev. 1379, 1416-19 (2012). The trouble with this claim is that it is based on Gingles and its progeny, not the statutory text or legislative history. There is virtually no indication in the text or history that Congress intended for Section 2 to be limited to compact minority clusters. See Karlan, supra note 290, at 199 (“Geographic concerns played only a minor role in the legislative history of amended Section 2.”).

\textsuperscript{341} See, e.g., 1982 Senate Report, supra note 338, at 269 (additional views of Sen. Hatch) (claiming that amendments create a “clear and inevitable mandate for proportional representation”).

\textsuperscript{342} Holder v. Hall, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring in the judgment).


\textsuperscript{345} For other scholars criticizing Gingles’s first prong, see Carstarphen, supra note 280, at 418 (“[T]he courts should begin by eliminating the compactness requirement . . . .”); and Karlan, supra note 290, at 202-03.
Second, and relatedly, the cause of action for racial gerrymandering could be discarded. This theory already has been criticized because it makes the message allegedly conveyed by a district a constitutional offense, even in the absence of any tangible injury.\textsuperscript{346} The theory has the additional drawback of rendering suspect the irregular districts that are needed to capture dispersed minority voters. These districts can be explained only on racial grounds, but any racial explanation triggers strict scrutiny, which the districts typically cannot survive. Accordingly, if the theory were cast aside, there would no longer be an equal protection threat to constituencies that enable integrated minorities to elect their preferred candidates. These districts would be valid under Section 2 and free from their current constitutional shadow.\textsuperscript{347}

Third, plaintiffs could start employing (and courts could start endorsing) additional techniques for measuring polarization. Surveys, in particular, hold enormous promise. Because they ask individuals about their electoral preferences, they avoid the ecological fallacy entirely. Their results are just as accurate whether precincts are racially homogeneous or heterogeneous, or whether there are two racial groups or more.\textsuperscript{348} The cost of surveys also is decreasing as online polling becomes more prevalent.\textsuperscript{349} Furthermore, statistical methods have emerged recently that allow public opinion in small geographic units to be calculated using modestly sized samples.\textsuperscript{350} And as Greiner and Kevin Quinn demonstrate, surveys can be combined with conventional techniques to produce more reliable polarization estimates than either approach alone. “[T]he hybrid is always preferable to the ecological model,” and also “dominates the survey sample estimator.”\textsuperscript{351}

Lastly, and most impactfully, litigants and courts could be more receptive to remedies other than single-member districts. No matter how cleverly they are drawn, it is difficult for such districts to enclose scattered minority voters—and impossible for them to provide representation to small minority groups. In contrast, multimember districts paired with cumulative, limited, or preferential

Precisely because of the incongruity of linking minority representation to residential segregation, the California Voting Rights Act, which otherwise mirrors its federal analogue, does not compel a showing of compactness. \textit{See} Sanchez v. City of Modesto, 145 Cal. App. 4th 660, 667-70 (Cal. App. 2006).


\textsuperscript{347} See Aleinikoff & Issacharoff, supra note 346, at 618 (also criticizing racial gerrymandering doctrine because it “condemns ‘race-conscious’ attempts to craft minority districts from scattered minority communities, yet complacently relies upon massive residential discrimination to justify compact majority-minority districts”).

\textsuperscript{348} Surveys, of course, have methodological issues of their own, such as high nonresponse rates, potentially nonrepresentative samples, questionable validity, and so on. \textit{See}, e.g., Cottier v. City of Martin, 604 F.3d 553, 559 (8th Cir. 2010) (en banc) (citing these concerns as reason not to credit exit poll in Section 2 case).

\textsuperscript{349} For example, Survey Sampling International’s price for a nationwide online survey with 2,000 respondents is only about $7,000. \textit{See} SSI, http://www.surveysampling.com/ (last visited Aug. 1, 2015).


voting face neither of these obstacles.\textsuperscript{352} They enable integrated minorities as well as minorities too small to constitute a local majority to elect the candidates of their choice.\textsuperscript{353} As Shaun Bowler and his coauthors find in a notable study, counties using cumulative or limited voting elect higher shares of black commissioners than counties using single-member districts.\textsuperscript{354} The alternative voting systems are unaffected by the geographic and numerical constraints that apply to traditional districts.

All of these options are appealing because they could be implemented without legislative action. A Congress that cannot agree on a new coverage formula for the VRA’s other core provision, Section 5, is highly unlikely to amend Section 2 in any significant way.\textsuperscript{355} However, the first two proposals are only slightly more plausible than congressional intervention. The current Court is no fan of Section 2’s, having frequently limited its reach and raised doubts about its constitutionality.\textsuperscript{356} The odds thus are low that the Court, at least as presently composed, would scrap \textit{Gingles}’s compactness requirement or reverse its racial gerrymandering rulings.

This leaves the third and fourth options, both of which could be undertaken without any Court involvement. No Court precedent precludes either the use of surveys to measure polarization or the judicial imposition of alternative remedies. These steps, then, should be the top priorities for plaintiffs and lower courts who would like for Section 2 to keep promoting minority representation even as residential integration rises. They are the most realistic way to prevent a key statutory goal from being frustrated by a trend that \textit{ought} to be irrelevant—but in fact is all too salient at every stage in the analysis.

\section*{IV. SCHOOL DESEGREGATION LAW}

The final area I cover is constitutional rather than statutory: school desegregation law, which bans the intentional segregation of public schools and
requires aggressive remedies to be maintained until all vestiges of the original violation have been eliminated. In this domain, of course, it is school segregation statistics that are crucial, not residential ones. I therefore begin this Part by summarizing the changes in, and causes of, school segregation. Public schools desegregated rapidly between the late 1960s and the late 1980s, and have sustained about the same level of racial separation ever since. The brisk drop was largely the result of judicial intervention, while the recent stasis comes from court orders being lifted while residential desegregation exerts a steady downward influence.

Next, I describe the role that residential segregation historically played in school desegregation litigation. It created conditions in which school district policies could have a segregative effect, from which an inference of segregative intent then could be drawn. It also made it harder for integrative measures to succeed, and so hindered districts’ efforts to attain unitary status. I then argue that residential integration has the opposite doctrinal implications. To the extent it promotes school integration, it weighs against a finding of segregative intent. Also to this extent, it assists school districts seeking unitary status.

Lastly, I comment on the state of school desegregation law as America continues to integrate residentially. On the positive side, there is reason to think that public schools will resume integrating in the near future, even if courts remain mostly somnolent, thanks to the ongoing residential trend. Less sunnily, the impact of this trend on school segregation is likely to be gradual, contingent on other factors, and less potent than judicial intervention. The impact, such as it is, also has no bearing on other racial imbalances in schools, involving faculty assignment, physical facilities, and the like. The need for courts to stay involved in this area—indeed, to become more involved—thus is undiminished.

A. Trends and Causes

School segregation is measured in the same way as residential segregation, only using different units. Public schools are the subunits in nearly all studies. School districts and metropolitan areas are the most common broader regions. Enrollment data about these entities enables the calculation of both evenness metrics like the index of dissimilarity and exposure metrics like the index of isolation. Here, the dissimilarity index represents the fraction of students who would have to switch schools in order for every school in the district or metropolitan area to have the same racial makeup. Similarly, the isolation index indicates, for the typical student of a certain race, the share of students in her school who belong to the same racial group. As in the residential context,

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358 See, e.g., Reardon & Owens, supra note 33, at 3.
359 See, e.g., Id. at 4.
the dissimilarity index is preferred by most scholars because it is unaffected by group size and better captures the colloquial meaning of segregation.360

In a helpful study, Logan and his coauthors compute the black-white dissimilarity index for school districts and metropolitan areas in 1970 (just as court-ordered desegregation began in earnest), 1990, and 2000.361 As shown in Figure 4, the score for the average district fell from close to 80% in 1970 to just under 50% in 1990 and 2000.362 The score for the average metropolitan area declined from about 80% in 1970 to roughly 65% in 1990 and 2000.363 (Metropolitan area segregation is higher than school district segregation because each area’s districts vary—often starkly—in their racial complexions.) More recently, Kori Stroub and Meredith Richards estimate the entropy index (a more sophisticated variant of the dissimilarity index) at the metropolitan area level from 1993 to 2009.364 As also shown in Figure 4, black-white school segregation decreased slightly over this period.365 The overall picture thus is one of sharp desegregation from the late 1960s to the late 1980s, followed by stability ever since.366

It is worth noting that certain scholars, in particular Erica Frankenberg and Gary Orfield, dispute this account. They claim that American schools actually are resegregating, based on data indicating that the typical black student now has a smaller share of white classmates, and is more likely to attend a heavily minority school, than in the 1980s.367 These shifts, however, are attributable entirely to demographic change (in particular, Hispanic and Asian immigration and the lower white birth rate), not to the distribution of students across schools.368 As

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361 See Logan et al., supra note 357, at 1622.

362 See id. at 1628.

363 See id. at 1627.


365 See id. at 510.


368 See, e.g., An & Gamoran, supra note 366, at 20; Clotfelter et al., supra note 34, at 381 (“[T]he rise in this measure is the result of demographic change rather than any growing racial imbalance among schools.”); Fiel, supra note 360, at 13 (showing that black-white and Hispanic-white exposure would have increased substantially from 1993 to 2010 had it not been for declining white share of student population); Logan et al., supra note 357, at 1; Reardon & Owens, supra note 33, at 8; Stroub & Richards, supra note 364, at 499.
Whites become an ever smaller fraction of the student population, it is inevitable that minorities will be exposed to fewer of them.\(^{369}\) (It also is inevitable that whites will be exposed to more minorities, which implies more rather than less integration.\(^{370}\)) I therefore join Logan and others in concluding that “[i]t is misleading to label these trends as resegregation,” and do not discuss them further.\(^{371}\)

Why does the trajectory of school segregation differ from that of residential segregation (which has declined steadily since 1970)? The answer is that residential segregation is just one of the drivers of school segregation. School segregation also is a function of three other sets of factors.\(^{372}\) First, the policies that school districts adopt can have significant integrative or segregative consequences. Measures (often court-imposed) such as adjusting attendance zones, busing students to diverse schools, and opening magnet schools that draw students of all races, can improve integration. On the other hand, neighborhood schools as well as school choice policies such as vouchers and charter schools can worsen racial separation.

Second, the configuration of school districts themselves can influence metropolitan area segregation. In particular, the more districts there are in a given area, the more potential there is for segregation to develop between (rather than within) districts. And third, the racial profiles of public schools depend in part on the numbers and identities of students choosing to attend private schools. Public school segregation can be affected by exit from the public system.

Of these factors, I focus here on school district policies adopted either in the wake of litigation or after the attainment of unitary status. These measures have larger impacts on school segregation than do school choice policies or private school enrollment.\(^{373}\) These measures also account nicely for the key features of

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\(^{370}\) See, e.g., GARY ORFIELD ET AL., E PLURIBUS . . . SEPARATION? DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 22 (2012) (showing decline in share of white classmates for typical white student).

\(^{371}\) Logan, supra note 360, at 1; see also, e.g., An & Gamoran, supra note 366, at 24 ("[O]ne cannot make inferences about school segregation from exposure rates."); Clotfelter et al., supra note 34, at 381 (commenting that isolation index “may have lost much of its meaning as a measure of racial segregation”); cf. Miliken v. Bradley, 418 U.S. 717, 747 n.22 (1974) (dismissing claim that “actual desegregation” could not be accomplished as long as the number of Negro students was greater than the number of white students").

\(^{372}\) See Sean F. Reardon & John T. Yun, Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000, 81 N.C. L. REV. 1563, 1564-65 (2003) (offering similar set of explanations for school segregation). Also importantly, the causality between residential and school segregation runs in both directions. School desegregation orders often cause whites to move out of school districts, thus increasing residential segregation. See, e.g., Nathaniel Baum-Snow & Byron F. Lutz, School Desegregation, School Choice, and Changes in Residential Location Patterns by Race, 101 AM. ECON. REV. 3019, 3033 (2011). However, this effect is muted when less aggressive desegregative techniques are used, see, e.g., Rossell & Armor, supra note 366, at 288, and when school districts encompass most of their metropolitan areas, see, e.g., Kendra Bischoff, School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?, 44 URB. AFF. REV. 182, 199 (2008).

\(^{373}\) The consensus in the literature is that school choice policies and private school enrollment have small negative impacts on school segregation. White students are more likely to take advantage of these options, and then more likely to make enrollment decisions that have segregative consequences. See, e.g., An & Gamoran, supra note 366, at 22 (finding that “inclusion of private schools in our analysis does little to change the overall
the post-1960s history of school segregation: a generation of improvement followed by a generation of stagnation.\textsuperscript{374} And since the Supreme Court has ruled out inter-district remedies (such as district consolidation) in almost all cases, these measures are the only ones that realistically are subject to judicial control.\textsuperscript{375}

Starting with court orders to desegregate, then, they were issued to about 750 school districts, mostly in the South and mostly in the late 1960s and 1970s.\textsuperscript{376} These orders typically required attendance zone adjustment, busing, magnet schools, majority-to-minority transfers, or other integrative steps.\textsuperscript{377} Thousands of additional districts took similar actions on their own, often in an effort to avoid litigation.\textsuperscript{378} In a recent study, Sarah Reber finds that the white-nonwhite dissimilarity index plummeted in school districts that were compelled to desegregate.\textsuperscript{379} As displayed in Figure 4, segregation fell by about 20\% in the two years after judicial intervention, and then maintained these gains for more than a decade.\textsuperscript{380} Other studies come to very similar conclusions.\textsuperscript{381}

Next, school districts began attaining unitary status in large numbers in the 1990s and 2000s, after a trio of Supreme Court decisions made release from judicial supervision easier to obtain.\textsuperscript{382} About two-thirds of districts ever subject to desegregation orders now have been deemed unitary, leaving only about 250 still required to abide by them.\textsuperscript{383} Most unitary districts eventually abandon their integrative policies and revert to neighborhood schools.\textsuperscript{384} In a study of all school

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\textsuperscript{374} See infra notes 376-388 and accompanying text.

\textsuperscript{375} See Milliken, 418 U.S. at 745 (holding that an inter-district remedy is available only if there has been an inter-district violation). According to the literature, the consolidation of school districts substantially improves school segregation (and vice versa). See, e.g., Paul M. Ong & Jordan Rickles, The Continued Nexus Between School and Residential Segregation, 19 BERKELEY WOMEN’S L.J. 379, 387 (2004) (“Metropolitan areas where the primary school students are concentrated in a few districts . . . are more likely to have [low] school segregation levels . . .”); Sarah J. Reber, Court-Ordered Desegregation: Successes and Failures Integrating American Schools Since Brown v. Board of Education, 40 J. HUMAN RESOURCES 559, 580 (2005) (finding that larger number of school districts in metropolitan area reduces nonwhite-white exposure index).

\textsuperscript{376} See Sean Reardon et al., Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools, 31 J. POL’Y ANALYSIS & MGMT. 876, 882 (2012) (identifying 755 school districts ever subject to court desegregation orders); Reber, supra note 375, at 561 (showing geography and timing of court desegregation orders).

\textsuperscript{377} See Rossell & Armor, supra note 366, at 278-82.

\textsuperscript{378} See id. at 291.

\textsuperscript{379} See Reber, supra note 375, at 568-69.

\textsuperscript{380} See id.

\textsuperscript{381} See, e.g., Rucker C. Johnson, Long-Run Impacts of School Desegregation and School Quality on Adult Attainments 11 (Jan. 2011) (using same analytical design and finding that desegregation orders reduce black-white dissimilarity index by about 20\%); Rossell & Armor, supra note 366, at 292 (15\% reduction for black-white dissimilarity index); Welch et al., supra note 366, at 50 (30\% reduction for black-white dissimilarity index); see also Logan et al., supra note 357, at 1631 (finding that metropolitan dissimilarity index decreases in 1990 and 2000 as share of children subject to desegregation order increases).

\textsuperscript{382} These decisions were Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); and Board v. Dowell, 498 U.S. 237 (1991). See also Reardon et al., supra note 376, at 887 (showing dismissals of desegregative orders from 1991 to 2009).

\textsuperscript{383} See id. at app’x tbl.A1.

\textsuperscript{384} See id. at 899 (noting that evidence supports view that “most districts adopt neighborhood-based
districts freed from desegregation orders, Reardon and his coauthors show that their black-white dissimilarity index increased moderately during the fifteen years after release. Specifically, as illustrated in Figure 4, segregation rose by about 5% over this period, or roughly one-quarter of the decrease originally attributable to judicial intervention. Again, other studies covering fewer districts generate almost the same results.

These findings about desegregation orders and unitary status, in conjunction with the ongoing decline in residential segregation, explain the trajectory of school segregation over the last half-century. Between the late 1960s and the late 1980s, demography and the judiciary operated in tandem. Rising residential integration pushed schools, slowly but surely, in the same integrative direction. Concurrently, court-ordered remedies cut school segregation more sharply than the residential trend ever could. But from the late 1980s to the present, demographic and judicial forces have worked at cross purposes. On its own, residential integration would have produced further school integration. This positive influence has been neutralized, though, by the unitary status that courts have granted to hundreds of school districts. The outcome of these countervailing pressures has been a draw—stasis where there would have been improvement had the judiciary stayed its hand.

That so few school districts remain subject to court supervision (about 250 out of roughly 14,000 nationwide) also suggests that residential and school segregation now are tied more tightly than in the past. When courts in an earlier era insisted on sweeping remedies, they decoupled the link between the two forms of segregation. Schools became integrated even as housing patterns stayed racially separated. But now that courts largely have left the stage, and most districts have exploited their departure to return to neighborhood schools, residential segregation should be a stronger predictor of school segregation. The integrative policies that dilute its impact mostly are no more.

This hypothesis turns out to be correct. In a multiple regression model of black-white metropolitan area school segregation, the coefficient for black-white residential segregation jumped from 0.58 in 1970 to 0.94 in 1990. The raw correlation between these two indices then increased again from 0.70 in 1990 to
And as shown in Figure 4, the correlation between black-white residential segregation (for the under-eighteen population) and black-white school segregation rose once again from 2000 to 2010. Residential segregation now accounts for an incredible 91% of the variation in school segregation at the metropolitan area level.

I address the implications of this strengthening bond at the end of this Part. In brief, it means that school segregation should resume declining in the future, even without judicial intervention, as long as residential patterns continue integrating. Below, though, I turn from empirics to doctrine. I first show how residential segregation historically assisted plaintiffs in school desegregation cases, at both the liability and unitary status stages. I then argue that residential integration throws a wrench into this area of law as well.

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391 See Erica Frankenberg, Metropolitan Schooling and Housing Integration, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193, 204 (2009) (using dissimilarity index). Other studies also have found an increase in the correlation between residential and school segregation during the 1990s. See, e.g., An & Gamoran, supra note 366, at 36 (using entropy index); Reardon & Yun, supra note 372, at 1590-93 (using entropy index and analyzing South only).

392 See Frankenberg, supra note 35, at 557-58 (using dissimilarity index).

393 See id. at 558.
B. Connection

A plaintiff’s initial task in a school desegregation case is to establish segregative intent—to prove that a school district deliberately separated students by race. The most direct way that residential segregation can support an inference of segregative intent is by helping to produce school segregation, from

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394 See Frankenberg, supra note 35, at 557-58; Logan et al., supra note 357, at 1622; Reardon et al., supra note 364, at 831; Reber, supra note 375, at 569; Stroub & Richards, supra note 376, at 510.

395 See, e.g., Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (noting that “differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate”).
which an invidious motive then can be deduced. Residential segregation can give rise to school segregation, which in turn can give rise to liability.  

A 1960s case involving the school system of Manhasset, a New York City suburb, illustrates this logical sequence. One of Manhasset’s neighborhoods was over 90% black, while the rest of the town was almost entirely white. For decades, the school district maintained a “rigid neighborhood school policy” that resulted in 99% of white students attending all-white schools and all black students attending a school that was 94% black. “On the facts of this case,” without the district having done anything other than retain its neighborhood school policy, the court found “state imposed segregation.”

Similarly, Corpus Christi exhibited “substantial residential concentration by ethnic groups” in the 1970s, with blacks and Hispanics “concentrated in a narrow area.” Here too, the school district adhered for decades to a “neighborhood school plan composed of geographic attendance zones” that yielded stark school segregation. And here too, the Fifth Circuit held that the Constitution was violated. “The Board imposed a neighborhood school plan . . . upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result.”

However, cases in which liability follows so closely from residential segregation are unusual. This is because school segregation alone, even if caused by segregated housing patterns, typically is not enough to make out a constitutional violation. As one treatise puts it, “Statistics demonstrating a racial imbalance in the racial composition of individual schools, by themselves, will probably not be sufficient” “to prove intentional or purposeful segregation.” At this stage, then, the more common role of residential segregation is somewhat more indirect. Rather than lead at once to culpability, it creates conditions in

396 As throughout the Article, I deal here with the legal implications of de facto, not de jure, residential segregation. De jure residential segregation can lead to liability even more directly since, assuming it causes de facto school segregation, segregative intent does not have to be inferred. An invidious motive is established by the de jure segregation. Cf. Milliken v. Bradley, 418 U.S. 717, 756 (1974) (noting that “purposeful racially discriminatory use of state housing or zoning laws” can result in liability in school desegregation case and justify imposition of inter-district remedy).
398 Id. at 212, 226.
399 Id. at 226.
400 Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 146 (5th Cir. 1972) (en banc).
401 Id.; see also id. at 145-46 (providing school segregation statistics).
402 Id. at 149. For other examples of residential segregation giving rise to school segregation and then to liability, see Hart v. Community Sch. Bd., 383 F. Supp. 699, 755 (E.D.N.Y. 1974) (“We cannot ignore the fact that the system of geographic school attendance, imposed upon segregated housing patterns, provides the broad base for racial isolation . . . .” (internal quotation marks omitted)); and Bradley v. School Bd., 338 F. Supp. 67, 84 (E.D. Va. 1971), rev’d on other grounds, 462 F.2d 1058 (4th Cir. 1972) (“School authorities may not constitutionally arrange an attendance zone system which serves only to reproduce in school facilities the prevalent pattern of housing segregation.”).
403 Notably, all of the cases of this kind that I have found predate Washington v. Davis, 426 U.S. 229 (1976), in which the Supreme Court clarified that the Equal Protection Clause is violated by discriminatory intent, not discriminatory effect.
404 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION § 5:9 (2014); see also, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977) (noting that school segregation “is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions”).
which school district policies such as new school construction and attendance zone adjustment can have a segregative effect. Segregative intent then is inferred from a district’s voluntary decision to adopt these policies.

Examples of residential segregation serving this function abound, including in the Supreme Court’s case law. In a 1973 decision, the Court dealt with the school system of Denver, one of whose neighborhoods, Park Hill, was “substantially Negro and segregated.” The school district used “various techniques such as the manipulation of student attendance zones, school site selection, and a neighborhood school policy” to keep the Park Hill schools heavily black and the schools in adjoining areas heavily white. In particular, the district built a new school “in the middle of the Negro community,” where many blacks and few whites would attend it, rather than in a location that would promote integration. These actions persuaded the Court that the district “had engaged in . . . deliberate racial segregation.”

Likewise, in a 1979 case, the Court confronted the school system of Columbus, whose near east side was “then and now [a] black residential area.” The school district established “optional attendance zones” that “allowed students in a small, white enclave” in the near east side “to escape attendance at black schools.” The district also provided for a “group of white students [to be] bused past their neighborhood school to a ‘whiter’ school.” And through “[g]errymandering of boundary lines,” the district ensured that “white residential areas were removed from the black school’s zone and black students were contained within that zone.” All of these steps had a segregative impact on Columbus’s schools because of the city’s underlying residential segregation. And in combination, they led to the Court’s conclusion that the district was guilty of “intentionally segregative actions.”

While the liability stage of school desegregation litigation is important, it has become quite rare in recent years. According to one study, in only a single case since 1990 has a school district been found culpable and then ordered to adopt a mandatory student assignment plan. Far more frequent now is the unitary status proceeding, in which a district tries to convince a court that it should be

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406 Id. at 191.
407 Id. at 192.
408 Id.
410 Id. at 461 n.8 (internal quotation marks omitted).
411 Id. at 462 n.9.
412 Id. at 462 n.10.
413 Id. at 463-64. For other examples of residential segregation enabling school district policies to have a segregative effect, from which segregative intent then is inferred, see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7 (1971) (involving “locating schools in Negro residential areas and fixing the size of the schools”); and United States v. Texas Educ. Agency, 564 F.2d 162, 171 (5th Cir. 1977) (involving “the construction and abandonment of schools, the selection of school sites . . . and the drawing of student attendance zones”).
414 See Lutz, supra note 387, at 133. Of course, multiple school desegregation suits have been brought in this period.
released from judicial supervision. Unitary status is granted if a district has complied in good faith with a court’s desegregation order, and if any “vestiges of past discrimination ha[ve] been eliminated to the extent practicable.”

“Vestiges” refer to racial imbalances in school enrollment and other areas, and are presumed to have been “proximately caused by intentional state action during the prior de jure era.”

Under this framework, residential segregation often prevents the achievement of unitary status by reducing the effectiveness of integrative measures and so fostering school segregation. The school segregation then is deemed a vestige of the original constitutional violation that has yet to be eliminated. For instance, Louisville was under a school desegregation order in the 1970s, and also experienced a rise in residential segregation due to a “trend . . . definitely toward ‘white flight.’” The segregative housing trend caused school attendance zones that had been designed to promote integration to stop working as planned. “[A]s blacks moved into [each] attendance area, the school would naturally become ‘blacker,’ particularly since whites would ‘flee.’”

Many of Louisville’s schools thus remained racially identifiable, prompting the Sixth Circuit to hold that “[a]ll vestiges of state-imposed segregation have not been eliminated.”

Similarly, Dallas was under a school desegregation order in the 1980s, when it “resemble[d] a pie in which one whole ‘wedge’ is made up of black residents, from the center of the district all the way to its outermost boundary.” This residential segregation, in combination with the city’s geographic sprawl and surging minority population, undermined all of the integrative policies the district attempted. Attendance zone adjustment produced only limited improvement in the face of the city’s difficult demography. Busing was infeasible due to the city’s traffic and size. And few students took advantage of voluntary majority-to-minority transfers that required them to enroll in schools far from their homes. Thanks to these obstacles, Dallas’s schools stayed highly

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415 See supra notes 382-383 and accompanying text.
417 See Green v. Cty. Sch. Bd., 391 U.S. 430, 435 (1968) (noting that racial imbalances can exist not only in “composition of student bodies” but also in “faculty, staff, transportation, extracurricular activities and facilities”).
418 United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring); see also Freeman v. Pitts, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) (describing “presumption, effectively irrebuttable . . . that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed”).
420 Id. at 928.
421 Id. at 929.
423 See id. at 699-700 (noting rise of minority student population from 42% in 1970 to 70% in 1980).
424 See id. at 713-44.
425 See id.
426 See id. at 748 (“[M]ost minorities would prefer to stay at home than travel to a far distant school that can still accept transfers of minority students.”).
Desegregating America

It is important to note, though, that residential segregation does not always prevent unitary status from being granted. Especially in more recent cases, it sometimes facilitates school districts’ release from judicial supervision. This is because courts today focus less on the extent of school segregation (which residential segregation tends to heighten), and more on districts’ responsibility for enrollment imbalances. Residential segregation is the most powerful force affecting school composition that is not under districts’ control. So if it is the only reason for continuing school segregation, then the resulting imbalances are not a vestige of the original constitutional violation. Rather, they are attributable to an independent demographic factor, and the chain of causality is broken.\(^\text{429}\)

The most famous case of residential segregation helping a school district achieve unitary status arose in 1992 in DeKalb County, a suburban area near Atlanta. The county’s school system was placed under a desegregation order in 1969.\(^\text{430}\) In the ensuing years, “radical demographic changes” took place, causing the “northern half of DeKalb County [to become] predominantly white and the southern half [to become] predominantly black.”\(^\text{431}\) This residential trend, in turn, led to severe school segregation: “50% of the black students attended schools that were over 90% black,” while “27% of white students attended schools that were more than 90% white.”\(^\text{432}\) The Supreme Court nevertheless held that the district had earned unitary status. The “population changes which occurred . . . were not caused by the [district’s] policies,” so the “current racial imbalance” was not a “vestige of the prior de jure system.”\(^\text{433}\)

The dual role that residential segregation plays at the unitary status stage—helping both to trigger and to rebut the presumption that continuing school segregation stems from the original constitutional violation—distinguishes this area from the others I have covered. The duality means that, here at least, residential segregation is not an unalloyed advantage for civil rights plaintiffs.

\(^{427}\) See id. at 692-95.

\(^{428}\) Id. at 706. For other examples of unitary status being denied in part due to the impact of residential segregation on school segregation, see Davis v. East Baton Rouge Parish Sch. Bd., 721 F.2d 1425, 1435 (5th Cir. 1983) (“The Board’s reliance on housing patterns as justification for the continued existence of one-race schools is not only factually but legally unsound.”); and Adams v. United States, 620 F.2d 1277, 1289-90 (8th Cir. 1980) (en banc) (explaining how residential segregation interacted with school district policies to produce school segregation after entry of original desegregation order).

\(^{429}\) See James E. Ryan, The Limited Influence of Social Science Evidence in Modern Desegregation Cases, 81 N.C. L. Rev. 1659, 1671 (2003) (“[D]emographic changes that occur after a court has implemented a desegregation decree can suffice to sever the link between prior acts of segregation and current levels of racial imbalance.”).


\(^{431}\) Id. at 475 (internal quotation marks omitted).

\(^{432}\) Id. at 476.

\(^{433}\) Id. at 494, 496. For other examples of residential segregation helping school districts achieve unitary status, see Pasadena City Bd. of Educ. v. Suptgler, 427 U.S. 424, 435 (1976) (granting unitary status where enrollment imbalances were caused by “changes in the demographs of Pasadena’s residential patterns” and not by “any segregative actions”); and Ross v. Housing Indep. Sch. Dist., 699 F.2d 218, 219 (5th Cir. 1983) (same where “the homogenous student composition of the schools does not stem from the unconstitutional segregation . . . but from population changes that have occurred since this litigation commenced”).
Rather, it benefits them if courts emphasize the resulting enrollment imbalances (as they usually did before the 1990s). But it weakens plaintiffs’ position if courts stress the causal link between district policies and school segregation (as they tend to do today). Fortunately, this complexity does not apply to the doctrinal implications of rising residential integration. As I argue next, this trend usually assists school districts, at both the liability and unitary status stages.

C. Complication

Begin with the liability stage. Just as residential segregation can support an inference of segregative intent more or less directly, so too can residential integration lead to the opposite conclusion in more or less straightforward ways. More directly, integrating housing can result in integrating schools, from which an invidious motive is harder to deduce. More circuitously, residential integration can create conditions in which school district policies that otherwise would have a segregative effect in fact have neutral or integrative consequences. An intent to segregate then cannot be inferred as easily from a district’s adoption of these policies.

Both of these causal pathways were on display in a 1980s case from Prince George’s County, a suburban region adjoining Washington, D.C. The county underwent “widespread and naturally occurring racial integration” during the 1970s, which caused the “distribution of th[e] minority population [to] become quite widespread and generalized.” 434 The county also reduced its busing of students and established more neighborhood schools—steps that could have increased school segregation sharply, but did not due to the residential integration. 435 Faced with this positive housing trend, as well as potentially segregative policies whose impact was blunted by the trend, the court could not find segregative intent. “[P]laintiffs have not met their burden of proving that defendants acted with a racially discriminatory purpose in implementing the . . . busing reversals.” 436

Likewise, Charles City County, Virginia was residentially integrated in the 1960s, when there were “no predominantly White or Negro areas” and “[p]eople of all of the races reside[d] throughout the entire county.” 437 The county adopted a freedom-of-choice plan that allowed each student to select which school to attend. 438 Such plans often failed to achieve meaningful school integration in this era, 439 but the county’s succeeded because of its favorable residential landscape. As the court observed, “freedom of choice had brought about a considerable

435 See id. at 1363 (describing gap between predicted rise in school segregation due to busing cutback and rise that actually occurred).
436 Id. at 1370.
438 See id. at 1203.
439 See Green v. Cty. Sch. Bd., 391 U.S. 430, 440 (1968) (“[T]he general experience under ‘freedom of choice’ to date has been such as to indicate its ineffectiveness as a tool of desegregation.”).
amount of school desegregation,” and “every White student in the county presently attends an integrated school.” The court therefore upheld the plan, adding that it was “leading to the abolition of a system of segregation.”

However, residential integration certainly does not preclude liability. In fact, if a school district enacts policies that manage to have a segregative effect despite an improvement in housing patterns, it may be easier to infer segregative intent. For example, “residential segregation in Rockford[,] Illinois] decreased during the 1970s and 1980s.” But school segregation rose in the district due to attendance zone manipulation and the “one-way busing of minority students.” The contrasting housing and enrollment trends convinced the court that the “clearly predominant cause of segregation in [Rockford] schools was the . . . affirmative segregative conduct by the [district], and not residential segregation.”

Next consider the unitary status stage. Residential integration typically helps school districts seeking to be released from judicial supervision because it causes integrative measures to be more effective and so increases school integration. This improvement then suggests that there remain fewer (or no) vestiges of the original constitutional violation—and thus that districts can be entrusted to manage their own affairs again. Enrollment statistics are vital evidence in any unitary status proceeding, and residential integration usually makes them more balanced.

For instance, Oklahoma City was under a school desegregation order in the 1990s, and experienced a remarkable drop in residential segregation during the two prior decades. Its black-white dissimilarity index fell from 87% in 1972 to 48% in 1992. Over this period, the school district relied on integrative techniques including “pairing, clustering, and compulsory busing.” Aided by the auspicious housing trend, these techniques led to a sharp decline in school segregation. The black-white dissimilarity index for the district’s schools plunged from 78% in 1971 to 24% in 1984. This impressive progress indicated that the district “had eradicated the vestiges of the dual system and was entitled to have the desegregation decree dissolved.”

Similarly, Fort Worth was under a school desegregation order in the 1980s, and underwent the “natural integration of residential neighborhoods” in the

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440 Bowman, 293 F. Supp. at 1204-05.
441 Id. at 1206. For another example of residential integration helping to prevent segregative intent from being inferred, see Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1316 (5th Cir. 1991) (upholding ruling in favor of Austin school district where there was “ongoing dispersion of Black persons . . . into areas formerly dominated by majority persons” (internal quotation marks omitted)).
443 Id.
444 Id.
445 See Freeman v. Pitts, 503 U.S. 467, 474 (1992) (“[A] critical beginning point is the degree of racial imbalance in the school district . . . .”).
447 Id. at 1156.
448 See id. at 1173.
449 Id. at 1148.
Areas that were “virtually all-white in 1970” became “more and more integrated according to 1980 census figures.” This improvement in housing patterns enhanced the integrative impact of school district policies such as busing and a “pyramid feeder system.” As the court noted, the “desegregation devices employed . . . were effective in integrating the schools.” The court therefore concluded that the district had “eliminate[ed] all vestiges of discrimination” and was “unitary in every respect.”

But just as residential integration does not preclude liability, it also does not guarantee unitary status. If a school district fails to adopt integrative measures that take advantage of the favorable housing trend, then its school enrollments may remain racially imbalanced. In turn, these imbalances may be deemed vestiges of the original violation that require judicial supervision to be maintained. This is precisely what happened to Topeka in the 1990s. Its black population “spread widely throughout the eastern part of the city” and also “beg[a]n to move into the western side.” But the district built new schools in areas where they “promot[ed] racial separation,” designed attendance zones that “did not further the process of desegregation,” and did not consider more potent remedies such as busing and magnet schools. As a result, Topeka’s schools did not integrate to the same extent as its homes, and the Tenth Circuit held that the district was not entitled to unitary status.

Accordingly, residential integration is a contingent rather than an automatic asset for school districts, at both the liability and unitary status stages. It does set the stage for integrative policies to make schools markedly less segregated. But districts must bite the bullet and actually enact these policies. If they are unwilling to do so, their racial imbalances are likely to linger, and they may be unable to extricate themselves from litigation.

To this proviso I should add the one I noted earlier in the FHA and VRA contexts—namely, that cases in which residential segregation benefits plaintiffs substantially outnumber those in which residential integration aids defendants. If anything, this caveat is even more important here. Unlike residential segregation, school segregation has not declined in recent years, but rather has held roughly constant. In addition, few school desegregation suits have been

451 Id.
452 Id. at 324.
453 Id. at 330. For other examples of residential integration helping school districts seeking unitary status, see Reed v. Rhodes, 179 F.3d 453, 458 (6th Cir. 1999) (exempting from further remedial measures “schools in which surrounding neighborhoods were racially integrated”); and Davis v. Sch. Dist., 95 F. Supp. 2d 688, 694 (E.D. Mich. 2000) (granting unitary status where “integration of the schools was being achieved naturally with the change in the racial composition of the community”).
454 See supra notes 250, 333-334 and accompanying text.
455 See supra notes 361-366 and accompanying text.
launched in the last generation. The set of cases in which residential integration could make a legal difference thus is doubly small: first, because the improvement in housing has yet to translate into equivalent progress in enrollments; and second, because the volume of relevant litigation is so low anyway.

But these are practical rather than conceptual qualifications. They do not undermine the key points that residential integration does complicate matters for school desegregation plaintiffs, and that these difficulties are apt to intensify as the integrative trend continues. They also do not challenge the statistical picture of school segregation I painted earlier. Below, then, I discuss the role that school desegregation law is likely to play in a more residentially integrated America. My outlook is conflicted—optimistic because of the tightening link between residential and school segregation, but skeptical because of the link’s inherent contingency and its irrelevance to certain racial imbalances.

D. Conciliation

From one angle, the prognosis for school desegregation doctrine is as positive as that for the FHA. One of the FHA’s goals is ending residential segregation. Likewise, the “ultimate end” of the doctrine is a “nonracial system of public education.” Residential segregation has fallen sharply in the last half-century. So has school segregation (though with a lull since the late 1980s), and it should resume declining in the future now that it is tied so closely to residential segregation. Therefore both the FHA and school desegregation law are making progress toward the achievement of one of their core objectives. Cue the celebration.

Adding to the positivity is the fact that residential integration makes voluntary policies to desegregate schools—enacted in the absence of a court order—more likely to be upheld. For the sake of brevity, I have not covered the complex case law on the constitutionality of these measures. In brief, though, residential segregation often necessitates aggressive actions such as assigning students to schools on the basis of race, which are highly suspect under current law. In contrast, more modest steps such as adjusting attendance zones and basing school assignments on neighborhood (rather than student) characteristics can be quite effective under integrating conditions. These policies usually have

461 See supra note 414 and accompanying text.
462 See supra Part II.C.
464 See supra Part IV.A.
been deemed valid by the courts.\textsuperscript{468} and if they were adopted more widely, they would lead to further school desegregation.

There are several flies in this ointment, though. First, even if school segregation declines at the same rate as residential segregation from this point forward (by no means a certainty), the resulting progress will be frustratingly slow. As noted earlier, the residential black-nonblack dissimilarity index has fallen by about 5\% per decade since 1970.\textsuperscript{469} But the typical court desegregation order in the 1960s and 1970s resulted in a 20\% decrease in school segregation within just two years—\textsuperscript{470}and there were cases of decrees producing as much as an 80\% drop.\textsuperscript{471} Sitting back and allowing the favorable housing trend to take its course thus is plainly a less productive strategy than judicial intervention or voluntary desegregation. Passivity is likely to produce gains, but only incremental ones.

Second, as I have stressed, the relationship between residential segregation and school segregation is highly contingent on school district policies. At present, most districts have chosen policies, neighborhood schools in particular, that cause residential segregation to be an excellent predictor of school segregation.\textsuperscript{472} But in the future, districts could take actions, such as attendance zone manipulation, new school construction, and certain school choice initiatives, that prevent declines in residential segregation from materializing in school systems.\textsuperscript{473} True, these measures could be challenged on the ground that they were adopted with segregative intent. But lawsuits of this sort seldom have succeeded in recent years.\textsuperscript{474}

And third, racial imbalances in enrollments are not the only ones that school desegregation doctrine seeks to eliminate. In a 1968 case, the Supreme Court famously held that the doctrine applies “not just to the composition of student bodies” but also to “every facet of school operations—faculty, staff, transportation, extracurricular activities, and facilities.”\textsuperscript{475} These other areas, however, are largely unrelated to residential patterns. That housing is integrating in a school district does not mean that its teachers are allocated without regard to race, that its minority and white students have access to the same resources, or that its schools are equally conducive to learning. Whatever optimism stems from

\textsuperscript{468} See Parents Involved, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (suggesting validity of policies including “strategic site selection of new schools” and “drawing attendance zones with general recognition of the demographics of neighborhoods”); Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 553 (3d Cir. 2011) (upholding attendance zone adjustment aimed at increasing school integration).

\textsuperscript{469} See supra Part I.B.

\textsuperscript{470} See Reber, supra note 375, at 568-69.

\textsuperscript{471} See Welch et al., supra note 366, at 41 (listing ten school districts where dissimilarity index fell by 64\% to 81\% after judicial intervention).

\textsuperscript{472} See supra notes 390-393 and accompanying text (discussing high and rising correlation between residential and school segregation).

\textsuperscript{473} See supra note 373 (summarizing literature on segregative effects of school choice policies).

\textsuperscript{474} See supra note 414 and accompanying text.

the residential progress, then, does not extend to aspects of school systems that are mostly impervious to it.

Putting aside these aspects (which are beyond this project’s scope), how could the law promote more extensive school integration? One option, alluded to above, would be to permit all voluntary desegregation policies, including explicitly race-conscious ones. The more limited measures that courts currently allow are helpful, especially in areas where residential patterns are integrating. But as Frankenberg and Genevieve Siegel-Hawley observe, they are “less likely to produce racial integration than former plans that relied upon race as a single assignment criteria.” If these former plans were put back on the table, they could generate larger gains than their weaker replacements.

Another possibility would be to tighten the connection between school segregation on the one hand, and liability and the maintenance of judicial supervision on the other. If segregative intent could be inferred more directly from segregated schools, then plaintiffs would have less difficulty establishing culpability and compelling school districts to take desegregative actions. Similarly, if the presumption that enrollment imbalances result from the original constitutional violation were strengthened, then districts’ ability to attain unitary status—and then switch to neighborhood schools—would be curtailed. The stark reality of racially separated schools again would become the doctrine’s fulcrum.

Of course, both of these suggestions fly in the face of recent Supreme Court decisions. The Court has rejected overtly race-conscious voluntary desegregation. It also has made it progressively easier for school districts to be deemed unitary, even if their schools (and homes) remain segregated. Given current law, then, the best course of action for proponents of school integration simply may be to sue more often. Yes, new school desegregation suits are a rarity these days. But unlike unitary status proceedings, the doctrine that applies to them has not been narrowed by the Court’s recent precedents. Many examples also exist, from around the country and over several decades, of plaintiffs managing to prove illicit intent even in the absence of formal segregative policies. And as several commentators have noted, there is no shortage today

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476 In my view, which I note here but do not defend at length, de facto school integration is both an intrinsic good and one that is appealing because of its positive educational consequences. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 838-45 (2007) (Breyer, J., dissenting) (advocating this position at length).
477 See supra note 467 and accompanying text.
478 Frankenberg & Siegel-Hawley, supra note 467, at 422.
479 See generally Owen M. Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564 (1965) (arguing for this position). The logical endpoint of this argument is that school segregation alone, without any evidence of segregative intent, should be enough to establish liability. Cf. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198 (1973) (carefully avoiding deciding whether “plaintiffs must prove . . . only that segregated schooling exists” or “also that it was brought about or maintained by intentional state action”). And while on the topic of overruling current precedent, school integration at the metropolitan level could be achieved much more easily if Milliken v. Bradley, 418 U.S. 717 (1974), were reversed and courts could order inter-district desegregative remedies.
480 See Parents Involved, 551 U.S. at 748.
481 See supra notes 429-433 and accompanying text.
482 See supra note 414 and accompanying text.
483 Some of these examples were covered in the liability stage discussions in Parts IV.B and IV.C, supra.
of district practices that certainly seem aimed at keeping students racially separated.\textsuperscript{484}

This is not to say that litigation should be launched willy-nilly. Especially in minority-heavy urban districts in the Midwest and Northeast, there may be little that suits can accomplish given the usual ban on inter-district remedies.\textsuperscript{485} But districts in the South and West tend to encompass both minority-heavy urban areas and whiter suburban and exurban regions.\textsuperscript{486} In the Midwest and Northeast too, suburban districts are becoming ever more diverse.\textsuperscript{487} There would be a wide array of targets, then, for a renewed campaign to combat school segregation through the courts. Such a campaign might lose many of its battles—but the ones it won likely would produce more integration than any other tactic.\textsuperscript{488}

\textbf{CONCLUSION}

I have tried to make two contributions in this Article. The first is to document and then explain the striking decline in residential segregation since 1970. This decline is one of the most important sociological developments of the last half-century. But to date, it has not been noticed by, let alone incorporated into, the law. The second is to explore how three bodies of civil rights doctrine—invoking housing discrimination, vote dilution, and school segregation—are connected to racial groups’ housing patterns. My central claim is that all three bodies historically have relied on the existence of residential segregation, and that all three are unsettled by integration. Their role in a less racially separated America thus urgently needs to be rethought.

This Article may come too late for some readers, and too soon for others. Too late because segregation has the ring of a bygone era, a time when the country paid more heed to, and worked harder to repair, its racial and spatial divisions.\textsuperscript{489} And too soon because our homes and schools, despite the progress


\textsuperscript{485}See Frankenberg, supra note 391, at 196 (“In the Northeast and Midwest in particular, the differences in racial composition of students across boundary lines [are] a contributing factor to the high levels of segregation . . . .”).

\textsuperscript{486}See Sean F. Reardon et al., The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989-1995, 37 \textsc{Demography} 351, 352 (2000) (commenting on “particularly large urban districts and the countywide districts in parts of the South and the West”).

\textsuperscript{487}See Clotfelter, supra note 357, at 80 (noting “increases in interracial contact in some suburban school districts”).

\textsuperscript{488}For hints that this kind of campaign already may be underway, see Holley-Walker, supra note 369, at 424 (noting “early indications that traditional desegregation cases may be in a period of revival”). Of course, the current Supreme Court is unlikely to be pleased about a resurgence of school desegregation litigation. Lower courts, though, may be more willing to find segregative intent in appropriate cases.

they have made, remain far from integrated. I would prefer to think, though, that the Article’s timing is quite apt. It is never overdue to call attention to where people choose to live or enroll their children. It also is hardly premature to reflect on the legal implications of desegregation. The trend is undeniable, it already is disrupting settled doctrine in several areas, and its impact only will grow in the future. The sooner the law begins to grapple with it, the better.
Readers with comments may address them to:

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