Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market

Adam Gordon†

INTRODUCTION

"If you people can't afford to live in our town, then you'll just have to leave."

With these words, Bill Haines, the Mayor of Mount Laurel, New Jersey, in 1970, rejected a proposal by the town's African-American community to build an apartment complex. Haines claimed that the town's zoning for large-lot, single-family homes could not yield to allow apartments.[1]

Local governments across the nation today give millions of poor, largely minority, Americans the same message every day (although the delivery is usually a bit more subtle). Two of America's leading housing economists, Edward Glaeser and Joseph Gyourko, have concluded that the refusal of local governments to allow developers to construct basic housing, such as apartments and small townhouses, is the most important driver of housing prices in America.[2] By constraining the housing supply, restrictive zoning drives up housing prices—a phenomenon that has contributed to the unprecedented 48.5% increase in home prices over the past five years.[3] While many have funded their dream retirement by cashing out on the small suburban ranch house they bought decades ago, others—including a disproportionate number of African Americans and Hispanics, who have significantly lower rates of

† Yale Law School, J.D. expected 2006; Editor-in-Chief, *The Next American City*. The author wishes to thank Richard Brooks, Jon Hooks, Philip Tegeler, and Kevin Walsh for their helpful suggestions, Owen Fiss for his supervision of the paper that was the basis for this Note, and Marin K. Levy for her excellent editing.

1. DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 2 (1995). This rejection led to the now-famous *Mount Laurel* doctrine, which holds that under the New Jersey State Constitution, each town must provide for its fair share of affordable housing according to regional need. *Id.* at 3.

2. Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGULATION, Fall 2002, at 24, 30.

3. Floyd Norris, *If Home Prices Plunge, Will Damage Be Worst in Democratic States?*, N.Y. TIMES, Dec. 24, 2004, at C1.

homeownership than whites[4]—have been left without the opportunity to buy a house at all.[5]

The practice of zoning in a way that excludes poor minorities from a town, though widespread, is illegal under the Fair Housing Act of 1968.[6] That Act, also known as Title VIII, was created to end extensive practices of racial discrimination in the private provision of housing. Federal courts have held that discrimination under the Fair Housing Act can be demonstrated under a disparate impact standard, analogous to the right of action under Title VII of the Civil Rights Act of 1964, thereby permitting courts to strike down zoning ordinances when those ordinances disproportionately exclude minorities on account of income. This Note argues that while this doctrine potentially provides a powerful tool for advancing the housing opportunities available to minorities, the employment market and the housing market differ in significant ways that require distinct remedies. In order to realize the promise of the Fair Housing Act to expand housing opportunities available to minorities, courts must better understand these economic differences and modify their remedies accordingly.

This Note begins by reviewing the development of the disparate impact right of action under the Fair Housing Act, and its current status as a settled area of law accepted by all but one circuit.[7] I then argue that the development of the disparate impact right under the Fair Housing Act through analogy to Title VII ignores important differences between the job market and the housing market, relevant to both the prima facie case for discrimination and the appropriate remedial action. First, statistical evidence for a prima facie case in housing should take into account more factors than those required for a prima facie case in employment. In Title VII cases, statistical proof of disparate impact rests on the effects of a particular test used by an employer for employment, whereas in fair housing cases there are many factors, such as income, wealth, and credit, which affect access to housing.[8] Second, remedial action is more difficult to formulate in Title VIII cases. In Title VII cases, the actor being sued and the actor capable of implementing the remedy are one and the same: the employer. In most exclusionary zoning cases, however, multiple actors, including local governments, developers, and banks implement the

4. Seventy-one percent of whites owned homes in 2000, compared with forty-six percent of African Americans and Hispanics. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL CENSUS OF HOUSING TABLES: HOMEOWNERSHIP BY RACE AND HISPANIC ORIGIN (2000), *available at* http://www.census.gov/hhes/www/housing/census/historic/ownershipbyrace.html.

5. This lack of opportunity is rooted in historical practices of mortgage market discrimination. *See* Adam Gordon, Note, *The Creation of Home Ownership: How New Deal Changes in Banking Regulation Simultaneously Made Ownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (2005).

6. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2000).

7. *See infra* Sections II.A-D.

8. *See infra* Section III.A.

remedy. To further complicate the matter, in most housing cases, only some of the relevant actors are defendants and thus bound by the court's ruling.[9] Finally, even once a remedy is formulated in a Title VIII case, the actual achievement of racial desegregation often remains in question. In Title VII cases, employers can create other qualifying tests to replace the ones struck down, so long as those tests bear a reasonable relationship to job performance. In Title VIII exclusionary zoning cases, no comparable test exists, meaning that units made available through litigation are open to thousands of applicants.[10] Empirical evidence measuring the impact of the *Mount Laurel* litigation helps explain the effects of the courts' failure to recognize the differences between Title VII and Title VIII cases.[11] Though based on a theory of liability specific to New Jersey state law, the case has many similar characteristics to Title VIII litigation. The *Mount Laurel* data show that, as currently remedied, Title VIII exclusionary zoning cases are likely to create significant opportunities for income integration, but not the racial integration that is the goal of the Fair Housing Act.[12]

I next turn to possible reforms to Title VIII jurisprudence that might address these problems. I begin by examining how courts might measure disparate impact differently to reflect the complexity of the housing market.[13] I then look at how courts might use their broad remedial powers to implement alternative remedies in Title VIII cases. I argue that due to the differences between the housing and labor markets, a greater consciousness of race is required in implementing remedies to housing cases in order to meet the Fair Housing Act's goals of nondiscrimination and integration.[14]

I. THE DEVELOPMENT OF TITLE VIII DISPARATE IMPACT LITIGATION AGAINST EXCLUSIONARY ZONING

A. *How Title VIII Became the Main Federal Claim Against Exclusionary Zoning*

In the early 1970s, a group of civil rights activists, attorneys, urban planners, and charitable foundations saw challenging suburban zoning codes as

9. *See infra* Section III.C.

10. *See infra* Section III.D.

11. The *Mount Laurel* litigation in New Jersey has produced the most significant state law making exclusionary zoning illegal. It has established a state constitutional obligation for every New Jersey municipality to provide its fair share of the regional need for affordable housing. *See* S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975); *see also* S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 451-52 (N.J. 1983).

12. *See infra* Section III.E.

13. *See infra* Section IV.A.

14. *See infra* Sections IV.B-D.

a significant next step for the civil rights movement. They were reacting to two major forces: the limitation of minority groups in most metropolitan areas to a few urban neighborhoods and the rapid expansion of exclusionary zoning across the country. First, as Norman Williams, a leading attorney in the movement, described, "the urban riots of the late 1960s . . . finally dramatized the point that . . . it was not the smartest thing in the world for the government to take active steps to box the minority groups into the old tired central cities."[15] Second, the use of exclusionary zoning had greatly intensified in the 1950s and 1960s. In the four most rapidly developing counties of New Jersey, for example, "405,000 acres were potentially available for mass housing . . . . [O]f the 405,000 acres, 99.5% was zoned against multiple dwellings."[16] In quick succession, civil rights activists organized a series of lawsuits against towns that practiced exclusionary zoning, making a range of claims under the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. In many cases, these activists triumphed in lower courts. But the Supreme Court quickly foreclosed almost all of these claims, both directly in exclusionary zoning litigation and indirectly in other civil rights litigation.

Early exclusionary zoning cases successfully advanced the theory that the Equal Protection Clause of the Fourteenth Amendment forbids local governments from adopting zoning laws with the effect of excluding low-income households. For example, the Ninth Circuit in *Southern Alameda Spanish Speaking Organization v. City of Union City* held that if "the effect [of exclusionary zoning] . . . is to deny decent housing and an integrated environment to low-income residents. . . . [Then] a substantial constitutional question is presented."[17] Additionally, a New Jersey trial court partly based a decision striking down an exclusionary zoning ordinance on income-based violations of the Equal Protection Clause in *Southern Burlington County NAACP v. Township of Mount Laurel*. The court held that "the States . . . are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws."[18] But in *San Antonio Independent School District v. Rodriguez*, the Supreme Court generally foreclosed strict scrutiny analysis based on income.[19] *Rodriguez* characterized past decisions of the Court as only recognizing protected classes on the basis of income or wealth in cases in which petitioners "shared two distinguishing characteristics: because of their impecunity they were

15. Norman Williams & Anya Yates, *The Background of* Mount Laurel I, 20 VT. L. REV. 687, 689-90 (1996).

16. *Id.* at 692.

17. S. Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970) (decided on different grounds).

18. S. Burlington County NAACP v. Twp. of Mount Laurel, 290 A.2d 465, 469 (N.J. Super. Ct. 1972) (quoting Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting)).

19. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[20] Lower courts thereafter avoided invoking the Equal Protection Clause based on income.[21]

A second line of early exclusionary zoning cases focused on claims under the Equal Protection Clause based on racial discrimination. In one exclusionary zoning case, the Second Circuit held that only discriminatory effect had to be shown to prove a violation of the Equal Protection Clause.[22] The Fifth Circuit similarly held, in reviewing a local government's denial of a housing project for predominantly Latino migrant farm workers, that "the effect of [the local government's] refusal was racially discriminatory. To prove a prima facie case of racial discrimination, no more is required."[23] However, this line of argument was foreclosed by the Supreme Court in *Washington v. Davis*,[24] which required a demonstration of discriminatory intent to prove racial discrimination under the Equal Protection Clause. The Supreme Court made this requirement manifest in the exclusionary zoning context in *Arlington Heights I*. In that case, involving the refusal by a nearly all-white suburb of Chicago to rezone property for low-income housing, the Court found that there had been no discriminatory intent and thus no liability under the Equal Protection Clause.[25] As long as local governments frame concerns about a proposed low-income housing development in terms of the numerous justifications for zoning decisions that courts have held valid,[26] and do not make outright expressions of racial discrimination or otherwise intentionally discriminate, the Equal Protection Clause provides no relief. The Equal Protection Clause is thus effectively useless for most exclusionary zoning challenges post-*Arlington Heights I*.

Concurrently with the denial of Equal Protection Clause claims based on suspect classification for exclusionary zoning cases, the Court foreclosed the other potential route for strict scrutiny under the Equal Protection Clause: infringement of a fundamental right. Advocates attempted to argue that the Constitution provided a fundamental right to housing, much as the Court had held it to provide a fundamental right to vote, and to travel freely. But *Lindsey*

20. *Id.* at 20.

21. The impact was immediate: *Rodriguez* came down between the trial court decision in *Mount Laurel* and the New Jersey Supreme Court's decision. The New Jersey Supreme Court, fearing reversal by the U.S. Supreme Court, did not even consider the trial court's Equal Protection Clause holdings, but instead decided the case entirely on the basis of state law. S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975).

22. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970).

23. United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974).

24. Washington v. Davis, 426 U.S. 229 (1976).

25. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (*Arlington Heights I*), 429 U.S. 252, 270 (1977).

26. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

v. Normet held that there is no "constitutional guarantee of access to dwellings of a particular quality."[27] In short, by 1977 the Supreme Court had foreclosed claims against exclusionary zoning under the Equal Protection Clause, absent the rare case of showing discriminatory intent. The Court, however, had not foreclosed claims under the Fair Housing Act.

B. *Establishing the Prima Facie Case for Disparate Impact under Title VIII:* Arlington Heights II

In *Arlington Heights I*, the Supreme Court remanded to the Seventh Circuit the question of whether Arlington Heights' zoning might create liability under the Fair Housing Act because the appellate court had not originally considered the claim.[28] Upon remand, the Seventh Circuit in *Arlington Heights II* first had to determine whether Title VIII allowed an effects test. The Seventh Circuit followed several earlier courts[29] in concluding that it did. It relied upon the Supreme Court's decision in *Griggs*[30] that the language in Title VII of "a test . . . intended or used to discriminate because of race"[31] was not, as the *Arlington Heights II* court put it, "an obstacle to [the Court's] ultimate holding that intent was not required under Title VII."[32] Rather, as the Seventh Circuit noted, the Supreme Court "looked to the broad purposes underlying the Act rather than attempting to discern the meaning of this provision from its plain language."[33] The similar "because of race" language in § 3604(a) of Title VIII,[34] combined with a finding of broad Congressional intent in the Fair Housing Act, led the Seventh Circuit to reject the strict test of discriminatory intent. The court held, "[w]e cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly."[35]

After allowing an effects test, the *Arlington Heights II* court had next to decide how to measure discriminatory effect. In early Title VII jurisprudence, two disparate impact tests were established: one based on a statistical measure

27. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972). In addition, constitutional claims against exclusionary zoning outside of the Fourteenth Amendment, such as free association and violations of the right to travel, were sweepingly denied by the Court's upholding a Long Island town's ordinance prohibiting more than two unrelated people from living together against a variety of constitutional challenges. Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

28. *Arlington Heights I*, 429 U.S. at 566.

29. Most notably United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

30. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

31. Civil Rights Act of 1963, Tit. VII, 42 U.S.C. § 2000e-2(h) (2000).

32. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1289 n.6 (7th Cir. 1977).

33. *Id.*

34. Fair Housing Act, 42 U.S.C. § 3604(a) (2000).

35. *Arlington Heights II*, 558 F.2d at 1290.

of how test criteria affected African Americans, and the other based on the actual number of African Americans in a given workplace.[36] First, *Griggs* looked at impacts of employment tests, holding that if test criteria "operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related."[37] In *Griggs* that meant that because African Americans had a lower rate of high school graduation than the population as a whole, the test could be predicted to exclude a disproportionate number of African Americans and was thus prima facie invalid. Second, several circuits looked instead at results—if the work force in question had a lower percentage of African Americans than the region as a whole, then a prima facie showing of disparate impact had been made.[38]

Arlington Heights II transferred both of these tests to the housing context, suggesting two possible ways to make a prima facie case of disparate impact. First, *Arlington Heights II* described a zoning criterion that "has a greater adverse impact on one racial group than on another."[39] Strangely, it measured this adverse impact not by comparing the proportion of blacks affected to the proportion of whites affected, as Title VII cases had done,[40] but rather by looking at absolute numbers, based on income levels affected by the zoning decision:

> It is true that the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area. But it is also true that the class disadvantaged by the Village's action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subsidization in 1970 were white.[41]

Thus, in order to make a strong disparate impact case under *Arlington Heights II*'s first test, one had to show that, in absolute numbers, more blacks than whites in a given region were in the income groups excluded by the town's zoning code. Such a requirement is nearly impossible to satisfy in a country in which African Americans comprise a minority even in metropolitan areas with a significant black population.

Arlington Heights II found liability instead based on its adaptation of the second test used in Title VII cases: current employment composition. This test in the Title VIII context, according to the *Arlington Heights II* court, measured "the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered

---

36. Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 107 (1974).

37. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

38. *See, e.g.*, Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n, 482 F.2d. 1333 (2d Cir. 1973); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970).

39. *Arlington Heights II*, 558 F.2d at 1290.

40. John Stick, *Justifying Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 412 (1979).

41. *Arlington Heights II*, 558 F.2d at 1291.

invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups."[42] The fact that Arlington Heights was "overwhelmingly white" allowed the court to override local zoning to allow construction of a development that "would be a significant step toward integrating the community."[43]

Thus, *Arlington Heights II* established two potential prima facie cases for discriminatory impact under Title VIII—one based on measuring the effect of an ordinance on blacks and whites and one based on current patterns of segregation. Upon reviewing the Arlington Heights fact pattern, however, the court only found liability on the latter theory. After establishing a test, the *Arlington Heights II* court then turned to possible avenues for the municipal defendant to rebut that prima facie case.[44]

C. *Finding The Parallel to Business Necessity in Title VIII*

Griggs established that, in Title VII cases, employers have one defense once a prima facie showing of disparate impact has been made. As the Court wrote, "[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[45] Because the main purpose of business is financial success, discriminatory practices can be upheld only if those practices sufficiently further financial success, without less discriminatory, equally effective alternatives. Local governments, in contrast, do not have as their major purpose profit maximization, and do not generally articulate their decisions in such terms.[46] Thus, courts had to devise new defenses for a municipality in a Title VIII disparate impact case.

The *Arlington Heights II* court substituted the hazy "interest of the defendant in taking the action which produces a discriminatory impact"[47] for

42. *Id.* at 1290.

43. *Id.* at 1291.

44. Note that some lower courts found that the entire four-part test was required as a prima facie showing, *See, e.g.*, Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 783 (E.D.N.Y. 1987). The general view today is that a simple showing of discriminatory effect was required to make a prima facie case, and the remaining factors are defenses for the municipality, and as such I will describe *Arlington Heights II* here using that framework. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d. 926, 935 (2d Cir. 1988).

45. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

46. The exception is that municipal governments often will use "fiscal impact analysis" to guide their zoning such that they will attract high-tax uses such as shopping malls and industrial parks to a greater degree than low-tax uses such as affordable housing. But local government zoning ordinances have traditionally been broadly upheld for fulfilling other justifications such as health, safety, morals, and welfare. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There are also Title VIII disparate impact cases against private defendants such as mortgage lenders, and in these cases the business necessity standard may make more sense. *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (1998).

47. *Arlington Heights II*, 558 F.2d 1283, 1293 (7th Cir. 1977).

business necessity. The opinion set forth a fairly deferential standard for measuring this interest:

> [I]f the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act . . . . In this case the Village was acting with the scope of the authority to zone granted it by Illinois law[48] . . . Moreover, municipalities are traditionally afforded wide discretion in zoning.

While this standard is extremely permissive, the *Arlington Heights II* court differentiated it from the business necessity test by stating that if the test is met, "this factor weakens plaintiffs' case for relief"[49]—but does not in itself rebut the prima facie case. The final result in *Arlington Heights II* would depend on the strength of the prima facie case, the strength of the defendant's interest, and two further criteria with no clear parallel in Title VII cases.

The first of these criteria (the court's third criterion as a whole) assessed "the presence of some evidence of discriminatory intent," which the court noted had been examined in several prior housing-related cases under the Equal Protection Clause and Title VIII.[50] The court concluded that since "we are dealing with a situation in which the evidence of intent constitutes an insufficient basis on which to ground relief"—as the Supreme Court had ruled in rejecting the Equal Protection Clause challenge in *Arlington Heights I*—"this criterion is the least important of the four factors."[51] Still, the court held that if some evidence of discriminatory intent existed, that evidence would strengthen the plaintiff's case.

The second additional criterion (*Arlington Heights II*'s fourth criterion) held that "courts ought to be more reluctant to grant relief when the plaintiff seeks to compel the defendant to construct integrated housing . . . than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction."[52] The court justified its holding by stating that courts generally are more willing to protect the interests of a private citizen in using his land as he chooses than to compel an unwilling defendant municipality to act (for example, to build public housing against its will).[53]

---

48. *Id.*
49. *Id.*
50. *Id.* at 1292.
51. *Id.*
52. *Id.* at 1293.
53. The Seventh Circuit specifically referred to two cases brought in the Second Circuit in failed attempts to compel municipalities to build public housing. *Id.* (citing Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974); Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974)). The court may have also been trying to provide a counterweight to the liberal standing generally allowed under Title VIII by *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). If applied to this case, *Trafficante* could have allowed almost any individual to sue a municipality for exclusionary zoning. This factor further constrains suits challenging exclusionary zoning ordinances under Title VIII, in some ways mimicking *Warth v. Seldin*, 422 U.S. 490 (1975), which interpreted constitutional

The *Arlington Heights II* court balanced its four factors. On the municipality's side, it found a strong state interest and no discriminatory intent. On the plaintiff's side, it found a strong discriminatory effect and a demonstration that the plaintiffs would be willing to build the housing themselves on their own land. Since it believed that discriminatory intent was the least important factor, the court held for the plaintiff.[54] In sum, the *Arlington Heights II* court imported standards from Title VII for a prima facie case of disproportionate impact or evidence of current segregation. The court found this evidence to be rebuttable by something akin to the business necessity test but further tempered by the additional factors of discriminatory intent and the defendant's willingness to actually construct housing.

D. *After* Arlington Heights II: *The* Huntington *Modifications*

Since *Arlington Heights II*, every circuit except the District of Columbia Circuit has found that Title VIII allows a disparate impact claim.[55] The Supreme Court, however, has never decided whether Title VIII allows such a claim.[56] Without Supreme Court precedent, the disparate impact exclusionary zoning case after *Arlington Heights II* most frequently cited by courts and commentators was decided by the Second Circuit in 1988: *Huntington Branch, NAACP v. Town of Huntington*.[57] In holding that the rejection by a Long Island suburb of a proposed affordable housing development violated Title VIII, the

---

standing limitations to prohibit suits by citizens generally interested in changing exclusionary zoning ordinances but allowed suits by prospective residents or developers with a concrete interest in a particular project.

54. *Arlington Heights II*, 558 F.2d at 1293-94. Note that the Seventh Circuit remanded the case for further factual determinations. *Id.* at 1294. After the litigation, the plaintiff settled with the municipality out of court to construct the housing on an alternate site. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 469 F. Supp. 836 (N.D. Ill. 1979)

55. In Circuit order, these cases are: Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 58 (D.D.C. 2002); Casa Marie, Inc. v. Superior Court, 988 F.2d 252, 269 n.20 (1st Cir. 1993); United States v. Starrett City Assoc., 840 F.2d 1096, 1100 (2d Cir. 1988); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147-48 (3d Cir. 1977); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Arthur v. City of Toledo, 782 F.2d 565, 574-75 (6th Cir. 1986); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974); Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988); Mountain Side Mobile Home Estates P'ship v. HUD, 56 F.3d 1243, 1250-51 (10th Cir. 1995); Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994). Not all of these cases focused on exclusionary zoning claims against municipalities—some have focused on discrimination by private actors or discrimination by municipalities in other acts such as directly developing public housing.

56. The Supreme Court denied certiorari in *Arlington Heights II*, and no other case has yet come to the Supreme Court. While *Huntington* was appealed to the Supreme Court, by that point the Town of Huntington did not challenge whether a disparate impact test was applicable under Title VIII, and so the Court explicitly did "not reach the question of whether that test is the appropriate one." Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988).

57. 844 F.2d 926 (2d Cir. 1988). Other cases have followed *Huntington*'s analysis. *See, e.g.*, Langlois v. Abington Hous. Auth., 207 F.3d 43 (1st Cir. 2000); Pfaff v. U.S. Dep't of Hous. & Urb. Dev., 88 F.3d 739 (9th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995).

Second Circuit engaged in a detailed analysis of the proper standard of review in such cases.

First, the *Huntington* court maintained the two means employed in *Arlington Heights II* of showing disparate impact: proof of adverse impact of the challenged practice, or a demonstration that existing segregation would be maintained by the practice.[58] However, the court made an important modification to the method of analyzing adverse impact, rejecting the standard of absolute numbers used in *Arlington Heights II* in favor of the proportional standard used in Title VII cases. Thus, even though 22,160 whites and only 3671 minorities would be eligible for the housing proposed, since the latter represented twenty-eight percent of the area's minority population and the former represented only eleven percent of whites, the NAACP was held to have had made a prima facie showing of disproportionate impact.[59]

Second, *Huntington* replaced *Arlington Heights II*'s deferential standard of demonstrating some government interest with a requirement of showing that the zoning in question "furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[60] This standard resulted in a more searching review of the municipality's actions than in *Arlington Heights II*. For example, the Town of Huntington claimed that it rejected the proposed development partly "to encourage private developers to build in the deteriorated area of Huntington Station"[61] instead of in the less developed area where the development was proposed. Such targeting of growth is a common element of zoning ordinances, and the *Arlington Heights II* court would have likely upheld it as an important government interest. But the *Huntington* court used the narrow tailoring requirement to hold that "if the Town wishes to encourage growth in the urban renewal area, it should do so directly through incentives which would have a less discriminatory impact on the Town."[62]

Finally, *Huntington* reexamined the two criteria of *Arlington Heights II* not adapted from Title VII cases: a finding of some discriminatory intent and the preference for cases brought by those actually proposing developments. *Huntington* rejected "inclusion of intent in any disparate impact analysis," arguing that such a standard confuses judges since the fundamental examination in a disparate impact case focuses on effect of a facially neutral rule.[63] But *Huntington* reaffirmed a preference for plaintiffs "seeking only to enjoin a municipal defendant from interfering with its own plans rather than

58. *Huntington*, 844 F.2d at 937.
59. *Id.* at 938.
60. *Id.* at 936 (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977)).
61. *Huntington*, 844 F.2d at 939.
62. *Id.*
63. *Id.* at 935.

attempting to compel the defendant itself to build housing."[64] Thus, *Huntington* continued to favor disparate impact cases brought by developers of affordable housing, rather than, for example, prospective residents of such housing.

In short, *Huntington* built upon the basic analysis used by *Arlington Heights II*, with a few important modifications: it applied a proportional standard for analyzing disparate impact, it required defendant municipalities to provide further justification of their policies to overcome a prima facie case, and it rejected any inclusion of intent in the balancing test.

II. PROBLEMS WITH THE *ARLINGTON HEIGHTS II-HUNTINGTON* TEST

Having explained the predominant procedure for reviewing disparate impact cases against exclusionary zoning practices under Title VIII, I now address three reasons for why this procedure alone is unlikely to achieve the racial desegregation goal of Title VIII. I begin by explaining why the prima facie case used by courts in exclusionary zoning cases ignores important realities of the housing market. I then move to questions of remedies—first describing the challenges inherent in having multiple actors implement remedies not found in Title VII, and then explaining why racial desegregation may not result even if a remedy were implemented. Finally, I present empirical evidence from the similar state court litigation of *Mount Laurel* to justify my claims.

A. *The Role of Credit in the American Housing Market*

Implicit in the basic disparate impact analysis in *Arlington Heights II* and *Huntington* is an unspoken assumption: if housing is constructed that is targeted or simply made affordable to a person of a given income level, it will be allocated randomly among people at that income level. Yet such a model does not accurately describe the American housing market today. In both the rental and homeownership markets, credit checks play a major role in housing allocation. And in the homeownership market, wealth is a further determinant of who gets housing.

Since *Arlington Heights II* and *Huntington*, credit checks have become a common practice by private landlords in allocating rental units.[65] Until recently, there was no concrete data on credit ratings by race, since major credit rating agencies do not keep racial data. However, two recent studies point to marked racial differences in credit ratings. A University of North Carolina analysis of thousands of home loans made to low-income borrowers by banks under the Community Reinvestment Act found that thirty-three percent of

64. *Id.* at 940.

65. John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 316-18 (2000).

African Americans had credit scores of less than 620, compared to fifteen percent of whites; thirty-two percent of African Americans had credit scores of 621 to 660, compared to twenty percent of whites; and twenty-two percent of Hispanic borrowers had no credit score, compared to four percent of whites and three percent of blacks.[66] A more comprehensive study by the Texas Department of Insurance, released at the end of 2004 in response to recent disparate impact lawsuits against insurance companies for their use of credit information in setting insurance rates, also found striking differences. The study concluded that "[i]n general, Blacks have an average credit score that is roughly 10% to 35% worse than the credit scores for Whites. Hispanics have an average credit score that is roughly 5% to 25% worse than those for Whites. Asians have average credit scores that are about the same or slightly worse than those for Whites."[67] Neither study measured the sources of this disparity, which could include genuine differences in creditworthiness between racial groups, discrimination in credit scoring, or a combination of both.

Regardless of the sources of the disparity, these recent studies shed light on key issues affecting the housing market. Specifically, they show that when credit scores constitute a major component of deciding who can rent an apartment or receive a loan for purchasing a home, blacks will be disadvantaged. One might hypothesize that this disadvantage exists because lower-income people generally have worse credit, and African Americans have lower incomes on average than whites. However, the data on CRA loans are limited to lower income groups, indicating that the racial disparities in credit may persist even after controlling for income. Thus, the income-centered analyses used in *Arlington Heights II* and *Huntington* likely overstate the number of blacks who will receive housing in the resulting developments.

B. *The Role of Wealth in Building Homeownership*

Though most disparate impact litigation under Title VIII to date has involved rental developments—perhaps because the vast majority of subsidized housing units in America are rentals—most Americans are homeowners.[68] One Title VIII case, *Dews v. Town of Sunnyvale*,[69] found liability based on constraints of homeownership by racial minorities under Title VIII. There is no reason why the theories of disparate impact developed under *Arlington Heights*

66. Michael A. Stegman et al., Automated Underwriting: Getting to "Yes" for More Low-Income Applicants (slide 9) (2001), http://www.housingamerica.org/downloads/web5.ppt.

67. TEX. DEP'T OF INS., REPORT TO THE 79TH LEGISLATURE: USE OF CREDIT INFORMATION BY INSURERS IN TEXAS 13 (2004), *available at* www.tdi.state.tx.us/reports/pdf/creditall04.pdf.

68. As of the 2000 Census, over sixty-six percent of Americans were homeowners. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL CENSUS OF HOUSING TABLES: HOMEOWNERSHIP (2000), *available at* http://www.census.gov/hhes/www/housing/census/historic/owner.html.

69. Dews v. Town of Sunnyvale, 109 F. Supp. 2d. 526 (N.D. Tex. 2000).

II and *Huntington* could not more generally apply to homeownership developments. In such situations, looking at income alone—or even income and credit—fails to measure the full disadvantage that African Americans have in accessing housing. Wealth disparities also play a vital role in keeping African Americans from buying homes in desirable communities.

Kerwin Kofi Charles and Erik Hurst have found that wealth disparities provide a key explanation for why only forty-six percent of African Americans are homeowners, as compared with seventy-one percent of whites.[70] Charles and Hurst examined a cohort of renters from the Panel Study of Income Dynamics (PSID), which tracks the same households over time. Thirty-two percent of whites renting their home in 1991 had become homeowners by 1996, while less than thirteen percent of black renters had become homeowners.[71] One could hypothesize that this disparity results from discrimination in the mortgage market—for example, that banks are more likely to accept applications for mortgages from whites than from blacks. Indeed, Charles and Hurst found that black applicants were more likely to have mortgage applications rejected than white applicants in their sample. But this difference only accounted for seven percent of the difference between the rates at which whites and blacks became homeowners. The other ninety-three percent resulted from far fewer blacks applying for mortgages than whites.[72] Charles and Hurst found that fifteen percent of blacks in the sample applied for a mortgage, compared to thirty-five percent of whites.[73]

According to Charles and Hurst, the most important factor explaining why fewer blacks initially applied for a mortgage is access to wealth. Looking at people in the PSID sample who actually bought a home, Charles and Hurst found that blacks and whites purchased homes in strikingly different ways. Fifty-five percent of whites paid their down payment with savings alone, compared to eighty-eight percent of blacks. Twenty-seven percent of whites received some or all of their down payment from their families, compared to only seven percent of blacks. And eighteen percent of whites paid at least part of their down payment with sources other than family or savings, compared to five percent of blacks.[74] Based on these findings, Charles and Hurst concluded that:

> Blacks are less likely to receive help from their families in financing their mortgage

70. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HISTORICAL CENSUS OF HOUSING TABLES: HOMEOWNERSHIP BY RACE AND HISPANIC ORIGIN (2000), *available at* http://www.census.gov/hhes/www/housing/census/historic/ownershipbyrace.html. Even controlling for income and education, African Americans are thirteen percent less likely to own homes than whites. Kerwin Kofi Charles & Erik Hurst, *The Transition to Home Ownership and the Black-White Wealth Gap*, 84 REV. ECON. & STAT. 281, 288 (2002).

71. Charles & Hurst, *supra* note 70, at 288.

72. *Id.*

73. *Id.*

74. *Id.* at 291.

> down payment even when the[ir] own income and simple demographics are controlled for. . . . [B]ecause blacks appear to be much less likely to get help from their parents than are whites, black renters with given levels of personal wealth and income should be less likely to apply for mortgages in the first place relative to whites to whom they appear identical.[75]

Thus, abstracting from the Charles and Hurst findings, whites and blacks with the same income levels will have different access to homeownership based on their access to wealth.[76] This access begins with their personal wealth, but also, significantly includes the ability to draw on wealth from other sources. Again, analyses of income alone will not account for these differences, and thus will lead to lower representations of blacks than would be expected by courts' proportional analyses.

C. *The Dual Structure of Disparate Impact in the Housing Market*

These challenges hint at a related problem in the remedial phase of Title VIII cases. Unlike in Title VII cases, Title VIII exclusionary zoning cases usually involve multiple actors with different legal roles and justifications in the housing market. Both the plaintiff and the defendant will generally be involved in implementing the remedy, even though courts generally impose remedial action only against the defendant.

In their tests, *Arlington Heights II* and *Huntington* favor Title VIII cases brought by private developers who want to construct housing over plaintiffs who wish to compel public agencies to build housing. Thus, in most successful Title VIII cases the party that actually develops the housing—the plaintiff private developer—will differ from the party against whom relief is granted. This existence of multiple actors in Title VIII cases differs from the standard Title VII disparate impact case. In a Title VII case in which an employer's practice is challenged, such as the test in *Griggs*, the employer carries out the remedy by devising a new test and using that test for future hiring. In an exclusionary zoning case, a municipality's practice is challenged, and the municipality similarly must formulate a new zoning practice that meets Title VIII. But the final choice of who receives the benefits of that zoning practice—who gets the housing—is not made by the town, but rather by the developers and, in the case of for-sale housing, the lenders.

Having multiple actors does not in itself constitute a problem. The problem arises because the criteria that produce a disparate impact from the municipal actor are more easily defended when used by developers and lenders. For

---

75. *Id.* Even if this requirement did not exist, most Title VIII cases would still involve the multiple actor issue, since most housing built in America is developed and financed by private developers, not public agencies.

76. Note that these differences in wealth may also help explain the disparity in credit scores, and so may impact the rental market as well. Personal wealth can be used to help avoid delinquencies and defaults—the main events lowering one's credit score.

example, consider a hypothetical Title VIII lawsuit by developer *P* against town *T*. *T*'s zoning prohibits apartments, and such a prohibition is found under the *Arlington Heights II-Huntington* standard to cause a disparate impact. Under *Huntington*'s narrow tailoring requirement, *T* is unable to offer a sufficient justification for its actions, and is forced to rezone the property owned by *P*. *P* then builds the apartments, and in renting them requires a minimum income and credit check. These actions by *P* have the effect of severely limiting the number of racial minorities who would be eligible for the housing, thereby evading the Fair Housing Act's goal.

If a Fair Housing Act claim is brought against *P* for these actions, *P* will face more sympathetic precedent than the municipality for two reasons. First, many courts have been cautious to allow Title VIII disparate impact cases against private actors.[77] Second, even courts that have allowed such cases have rejected a "compelling business necessity" standard for defense to a prima facie disparate impact case (a standard proposed by HUD during the Clinton Administration) in favor of a far more lenient standard—a "manifest relationship" between the challenged practice and the private actor's economic interests.[78] *P* could potentially even meet a "compelling business necessity" standard by showing the relationship between income and credit and ability to pay for housing; a "manifest relationship" standard does not pose a serious challenge to *P*'s practices. Thus, even when municipalities are held to have violated Title VIII for discrimination on the basis of income with a disparate racial impact, and even if an analysis were extended to consider the bases of credit and wealth, the developers who would build the resulting housing could still discriminate on those bases, limiting the ultimate desegregative effect of remedial action.

D. *The Effects of Municipalities Lacking a "Better Test"*

Even if a remedy is successfully implemented, and even if the multiple actors involved voluntarily did not discriminate on bases such as credit and wealth, the remedy still would likely be ineffective in achieving desegregation. The *Arlington Heights II* court's opinion, repudiating the Title VII proportional standard for measuring disparate impact in favor of comparing the absolute number of whites and blacks,[79] failed to strongly articulate why it rejected the Title VII approach. This failure may explain why the *Huntington* court found it

77. *See, e.g.*, Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975); Brown v. Artery Org. Inc., 654 F. Supp. 1106 (D.D.C. 1987).

78. Mahoney, *supra* note 46, at 477 (citing Mountain Side Mobile Estates v. HUD, 56 F.3d 1243 (10th Cir. 1995)). This standard parallels the standard announced by the Supreme Court for Title VII cases in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and then rejected by Congress in the 1991 Civil Rights Act.

79. *See supra* text accompanying note 41.

easy to return to the standard Title VII proportional approach. But, perhaps unknowingly, the *Arlington Heights II* court may have been recognizing an important difference between Title VII and Title VIII cases.

In Title VII cases, the result of rejecting a test, such as the high school graduation requirement in *Griggs*, is to allow the employer to create a substitute test that does not have an impermissible disparate impact. In *Griggs*, the Court held that "[n]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."[80] After *Griggs*, Duke Power was therefore allowed to go back and formulate a different test that more precisely measured job qualifications, creating a new class of people who would be favored for the job.

One cannot envision a similar process in Title VIII cases. Returning to *Huntington*, one can imagine other ways in which the local government could encourage its legitimate objective of revitalization; indeed the *Huntington* court suggested an incentive program.[81] But one cannot imagine alternatives in which the local government finds another way to preference one class of people. Effectively, *Huntington* held that preferring one group of people to another on the basis of income is not a legitimate government objective.[82] If preferences based on income are not a legitimate basis for discrimination, can municipalities formulate other legitimate criteria that exclude some people and not others?

Many municipalities have attempted to impose residency requirements on affordable housing developments, limiting occupancy in those developments to those who already live, or in some instances work, in the town. But these requirements have been held to violate Title VIII on account of disparate impact. Since the towns imposing the residency requirements generally are mainly white, a residency requirement has a disparate impact on blacks.[83] There are also several miscellaneous examples of preferences in zoning—New York State has allowed municipalities to zone for "artist housing," which requires certain kinds of artists to live in buildings in a particular zone.[84] And municipalities often zone some land for age-restricted developments for the

80. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

81. *See supra* text accompanying note 62.

82. This decision is buttressed by more general jurisprudence such as Supreme Court decisions finding that concerns about costs of service provision cannot provide a valid justification for residency requirements for receiving welfare, as the effect is simply to shift those costs to another state. *See* Elliot M. Mincberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 179 (1976) (citing Shapiro v. Thompson, 394 U.S. 618, 632-34 (1969)).

83. *See, e.g.*, United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716 (S.D. Ala. 1980); *In re* Twp. of Warren, 622 A.2d 1257 (N.J. 1993).

84. Elliott Barowitz, *Soho, Noho, and Tribeca: Artist Housing—Space To Live and Work*, 3 CITY LAW 25 (1997).

elderly.[85] Generally, however, zoning requirements address only the characteristics of a building, not who occupies the building.

Thus, once a Title VIII suit requires a town to allow for the types of buildings that can provide low-income housing, the town has few options to further restrict who occupies that housing. Given the general shortage of affordable housing, particularly in desirable suburban communities, there will usually be far more applicants for housing than spaces available, with few legally cognizable ways for a municipality to prefer one applicant to another. The *Arlington Heights II* standard of absolute numbers instead of proportion has some relevance, then, in understanding who might ultimately receive the housing in question. To use the fairly typical development proposed in *Huntington* as an example, a potential applicant pool of 22,160 whites and 3671 minorities for a 168-unit development[86] will likely lead to a mainly white development—perhaps even an all-white development if affirmative efforts are not made to market the development to minority households. Such a development would not meet the goals of the Fair Housing Act of ending racial discrimination and segregation.

E. *Empirical Evidence of the Effects of These Gaps*

All of these differences between the labor and housing markets seem, in theory, like they would create problems for racial integration in housing developed from Title VII cases. It is important to understand whether they do empirically. Unfortunately, I am unaware of any studies of the occupants of developments created from Title VIII cases (which is not surprising due to the relative paucity of these cases to date). However, studies and anecdotal evidence from housing created through a similar process mandated under state law by New Jersey's *Mount Laurel* decisions suggest that these differences do result in the exclusion of most racial minorities from affordable housing created by such programs.[87]

As in Title VIII litigation, the main *Mount Laurel* remedy has been to allow private developers to build housing not previously allowed under town zoning ordinances.[88] Eligibility for the housing is determined by income level.[89] Most applicants for this housing are screened by developers (with some local

85. This tactic is often a preferred way to gain more affordable housing without the costs to schools and fear of influx of outsiders usually associated with such housing. Still, all towns will zone for at least some—and in most towns, most—of their housing as non-age-restricted.

86. *Huntington*, 844 F.2d at 931.

87. Several other states have created their own state doctrines placing additional limits on exclusionary zoning through statute or judicial decision. *See, e.g.*, MASS GEN. LAWS ANN. ch. 40B, § 22 (West 2004); Britton v. Town of Chester, 595 A.2d 492 (1991).

88. *See* John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685 (1998) (reviewing CHARLES HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996)).

89. N.J. ADMIN. CODE § 5:93-7.4 (2006).

government supervision), who have significant latitude in picking occupants and marketing units. There is no "better test," because other criteria for distributing *Mount Laurel* units, such as residency preferences, have been struck down by state courts.[90] Furthermore, the number of qualified applicants far exceeds the quantity of housing available. As of 1996, a state database of people looking for affordable housing contained information for 36,000 applicants who had met the requisite income levels, but had not received housing (as compared to 7500 applicants who had found housing through that state database, which is discussed further below).[91]

Unfortunately, due to the decentralized nature of this core component of the *Mount Laurel* program and the lack of comprehensive data-gathering requirements, there are no data available on the racial composition of the recipients of *Mount Laurel* housing. However, there are data available on a subgroup of *Mount Laurel* units for which municipalities contracted with a state government agency, the Affordable Housing Management Service (AHMS), to help market, select occupants for, and manage the units (though developers still retained some of the marketing and selection roles).[92] An extensive 1997 study by Naomi Bailin Wish and Stephen Eisdorfer examined these data as of 1996.[93]

As discussed earlier, whites generally comprise the vast majority of people eligible for low-income housing. That pattern held true in New Jersey, where, as of the time of the Wish and Eisdorfer study, whites represented seventh percent of eligible applicants, blacks twenty-one percent, and Latinos four percent.[94] But something interesting happened with the AHMS-administered program: the applicant pool ultimately included a wildly disproportionate number of minorities. Applicants were forty-five percent black, twelve percent Latino, and only thirty-three percent white.[95] Wish and Eisdorfer attribute this difference to either "a very successful affirmative marketing strategy" or the willingness of blacks to seek out affordable housing, perhaps because they face particularly severe problems in finding adequate housing.[96] The general perception in New Jersey is that these data are particular to the AHMS-

90. *In re* Twp. of Warren, 622 A.2d. 1257 (N.J. 1993).

91. Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1281 (1997). The study indicates that AHMS-managed units likely represent only about one-eighth of *Mount Laurel* units, and an even lower share of units in the suburbs (there are also units coming out of *Mount Laurel* in cities under a program of dubious legality known as the "Regional Contribution Agreement" provision, allowing suburbs to transfer part of their obligation to central cities). *Id.* at 1285-86; Cynthia N. McKee, *Resurrecting Title VIII Litigation To Achieve the Ultimate* Mount Laurel *Goal of Integration*, 27 SETON HALL L. REV. 1338 (1997).

92. Wish & Eisdorfer, *supra* note 91, at 1282.

93. *Id.* at 1281.

94. *Id.* at 1288.

95. *Id.*

96. *Id.*

managed units, given strong affirmative marketing to minorities and a statewide database, both of which make units more accessible to minorities. In the majority of cases in which towns run their own programs, there are more lax affirmative marketing requirements.[97] Furthermore, it is more difficult for minorities from outside a town to determine how to sign up for the applicant lists, which are administered by idiosyncratic municipal offices.[98]

Even though applicants for the AHMS-administered housing were primarily minority, the recipients of AHMS-administered units in New Jersey's suburbs were primarily white. According to Wish and Eisdorfer, "Blacks have only one-half the success ratio of whites; Latinos have only one-third the success ratio. These racial and ethnic disparities are especially dramatic for low-income households."[99] As a result, out of the AHMS-administered units in the suburbs, only nineteen percent went to non-whites.[100] Moreover, most of the houses that went to non-whites went to those already living in the suburbs; of 2675 AHMS unit recipients for which full data were available, only forty-five were African-American and Latino households moving from cities to the suburbs.[101]

As Wish and Eisdorfer suggest, "[t]he fact that the disparities are greatest for low-income applicants would be consistent with a hypothesis that it is the result of the dramatically lower personal wealth levels among lower income Black and Latino households than low-income White households."[102] White households had more wealth—as the Charles and Hurst study would predict—so they were better able to access *Mount Laurel* housing than racial minorities.

The *Mount Laurel* selection process focused on income without including wealth and credit, left the process of picking occupants at least partly to developers, and had far more qualified applicants for housing than available spaces due to the absence of further tests to narrow the applicant pool. These details mirror Fair Housing Act cases; indeed, we might even expect better results from the *Mount Laurel* units because the AHMS-administered units in *Mount Laurel* have affirmative marketing requirements not found in Fair Housing Act cases. The fact that *Mount Laurel* units have had only limited success in racially desegregating suburbs with exclusionary zoning practices suggests that Fair Housing Act-created units likely would lead to similar failure under current doctrine, given the similarities between the underlying processes. Evidence of a limited impact on racial segregation from *Mount Laurel* indicates

97. *See* N.J. ADMIN. CODE § 5:93-11.3 (2006).

98. *Id.* Note that each municipality maintains its own lists and advertising procedures; there are 566 municipalities in New Jersey.

99. Wish & Eisdorfer, *supra* note 91, at 1303.

100. *See id.* at 1294.

101. *See id.* at 1303.

102. *Id.* at 1303-04.

a failure to accomplish only some of the relevant goals, because liability exists for both racial and income segregation under New Jersey state law. However, a similarly limited impact in Title VIII cases would indicate a more serious failure, since in Title VIII cases income is legally cognizable only as a proxy for race, not as an independent basis on which discrimination is prohibited.

III. NEW APPROACHES TO ENSURE THAT TITLE VIII EXCLUSIONARY ZONING CASES ACHIEVE RACIAL INTEGRATION

In this Part I examine possible reforms to Title VIII jurisprudence aimed at ensuring that housing created through that jurisprudence is accessible to racial minorities. I focus on what actions courts should take, because courts determine remedies in Title VIII cases under the broad authority of § 3613 of the Fair Housing Act to "grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including . . . ordering such affirmative action as may be appropriate.)"[103]

I first look at changes to the prima facie Title VIII case suggested by my analysis of the housing market and conclude that, though such changes are desirable, they will not lead to significant advances in minorities' ability to access housing in exclusionary towns. I therefore turn to race-conscious remedies, examining the constitutional constraints on courts' ability to construct such remedies. I conclude that precedent supports the use of race-conscious remedies, including both aggressive affirmative marketing and potentially, in some cases, quotas. I argue that courts should implement these remedies in order to ensure that Title VIII exclusionary zoning cases in fact result in racial desegregation, and not just in economic integration.

A. *Changing the Measure of Disparate Impact*

By examining measures of disparate impact that focus on income alone, courts ignore the disparities in credit and wealth that also bar racial minorities from housing markets. Courts should find ways to measure these disparities, especially in cases that involve homeownership developments. There are two possible approaches to measuring these disparities, which I describe below—one better applied to rental cases and one better applied to homeownership cases. Unfortunately, while each of these approaches could increase the chances of having significant numbers of minorities benefit from developments resulting from the Fair Housing Act, the dual-actor problem and the lack of a better test would remain significant barriers to realizing this goal.

Currently, when a developer proposes a project in an exclusionary zoning suit under Title VIII, she describes the income criteria for selecting residents

103. Fair Housing Act, 42 U.S.C. § 3613 (2000).

for the development. The developer then explains how not permitting housing for that income range has a disparate impact on racial minorities who disproportionately fall into that income range. One can imagine similar processes for credit in a rental development: a developer would explain her credit requirements for a development and how not having housing available to people in that credit range would have a disparate impact on racial minorities who disproportionately fall into that credit range. This approach is theoretically sound. Unfortunately, it would work in practice only when there is accurate data available on the credit ratings of different racial groups; currently, such data are only available in very limited forms in a few states.

Such an approach would not work for homeownership developments because developers do not generally review the financial qualifications of homebuyers; that task falls to any number of banks, each with their own criteria for credit and wealth. Thus, a developer does not have the ability to tell a court what the credit and wealth criteria are for her development. However, what a developer could provide is the projected sales prices of the homes she is building. The court in *Dews v. Sunnyvale*, a case considering a Title VIII challenge by a developer interested in building for-sale housing, suggested a useful way of employing this information. The developer introduced evidence showing that Sunnyvale's zoning excluded all homes that cost under $150,000 and that a change in the zoning ordinance could make such housing possible. Based on that evidence, the *Sunnyvale* court compared the population in metropolitan Dallas that purchased homes costing over that amount (three percent black) with the population that purchased homes costing less than $150,000 (fifteen percent black).[104] Because the number of African Americans who actually could buy homes costing more than $150,000 was disproportionately low—likely due to a combination of income, wealth, and credit—the *Sunnyvale* court found that the zoning ordinance violated Title VIII. This approach, in homeownership cases, provides a helpful solution to the challenge caused by the developer not being able to provide selection criteria for prospective homebuyers.[105]

These reforms would more aptly characterize how exclusionary zoning ordinances harm racial minorities. However, the practical hurdle presented by wealth and credit is not establishing a prima facie case—which, as one recent

104. Dews v. Town of Sunnyvale, 109 F. Supp. 2d. 526, 567 (N.D. Tex. 2000).

105. This approach potentially could apply to rental developments as well. The court could look at how many rentals at a certain price level are occupied by a particular minority group in a given metropolitan area. However, such an approach might lead to misleading data. Many units are rented at high prices in inner-city neighborhoods to minorities who cannot access lower-cost units in the suburbs due to credit issues or racial discrimination. Thus, occupancy of higher-cost units may actually reflect a lack of credit, not the availability of it. Similar problems have arisen in the homeownership market in recent years with predatory lenders, but in most metro areas these instances are not as likely to skew the overall metro area data as in the rental data. This is because predatory sales represent a lower percentage of metro area home sales than low-credit, high-price rentals as a percentage of metro area rentals.

law review article demonstrates, is easy to do in most major metropolitan areas using the income criteria alone.[106] The problem is that when private developers choose applicants, higher-wealth and better-credit applicants float to the top, as evidenced by the study of *Mount Laurel*.[107]

One could theoretically remedy this problem by requiring developers to give preference to low-wealth, bad-credit applicants. However, such an approach would likely fail due to the multiple actor problem—wealth and credit are legitimate criteria for private developers to use, especially under the relaxed "manifest relationship" standard.[108] Even if such an approach were legal, it would discourage developers from proposing developments because of the potential loss to their businesses. Furthermore, such a remedy would do little to address the problems posed by having a massive number of applicants for any given slot. In most metropolitan areas, there would still be many more white applicants with low incomes, low wealth, and bad credit than black applicants, even though black applicants disproportionately fall into these categories.

In sum, courts should incorporate disparities in wealth and credit into their analysis of disparate impact. Simply using those disparities as proxies for race, however, is likely to result in only limited racial desegregation and furtherance of the goals of Title VIII. I thus turn to an examination of race-conscious remedies.

B. *Race-Conscious Remedies: Compelling Interests*

Race-conscious remedies provide a way to actually meet the goals of Title VIII—ending racial discrimination and segregation. However, all such remedies are subject to the strict scrutiny standard developed in *Croson*[109] and *Adarand*,[110] requiring a compelling government interest and narrow tailoring of the remedy. Currently, the Supreme Court recognizes two types of compelling government interest in race-based allocation systems: remedying past discrimination and, post-*Grutter*,[111] certain forms of encouraging diversity. In a different context, courts have considered how the remedial interest might apply to housing, though how these cases apply to Title VIII is unclear. The diversity interest has yet to be applied post-*Grutter* to the housing context, though earlier cases suggest that it too is a compelling government interest based on the Congressional policy goal of integration in the Fair Housing Act.

---

106. Josh Whitehead, *Using Disparate Impact Analysis To Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L.J. 359 (2005).

107. *See supra* text accompanying note 102.

108. *See supra* text accompanying note 78.

109. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

110. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

111. Grutter v. Bollinger, 539 U.S. 306 (2003).

In a host of cases against public housing authorities that practiced racial discrimination in siting developments, courts have generally approved race-conscious plans to remedy past discrimination.[112] The Supreme Court approved such plans in *Hills v. Gautreaux*,[113] upholding a lower court order to remedy past discrimination in public housing in Chicago through a metropolitan-wide desegregation plan. The Chicago Housing Authority (CHA) and the U.S. Department of Housing and Urban Development (HUD) had deliberately kept public housing projects for African Americans out of white neighborhoods. The *Gautreaux* court allowed a remedy in which African-American tenants of CHA projects received opportunities to move to urban and suburban areas without public housing. In a later consent decree, the CHA and HUD were ordered to build two-thirds of all public housing projects in largely white areas in the city and surrounding suburbs until 7100 African-American households had moved from public housing (or public housing waiting lists) to these areas.[114]

What courts have not done is use their broad remedial discretion under § 3613 to order race-conscious remedies in disparate impact exclusionary zoning cases. Any such order would be subject to the concrete standards set by *Croson*—decided thirteen years after *Gautreaux*—for what constitutes a compelling government interest in remedying past discrimination. *Croson* held that only "identified discrimination in the Richmond construction industry" could support set-asides for minority contractors in that industry.[115] More generic past evidence of national patterns in the industry, or local school segregation patterns, did not suffice. However, at least six Justices in *Croson*—including Justices White and O'Connor, Chief Justice Rehnquist in Part II of the Court's opinion, and the three dissenting justices, Brennan, Marshall, and Blackmun—held that past intentional discrimination by the local government was not required. As O'Connor's opinion declared: "[A] state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction . . . and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."[116] Furthermore, the six Justices distinguished the Richmond policy from a federal policy enacted within Congress's remedial powers under § 5 of the Fourteenth Amendment, which could "identify and redress the effects

112. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976). For a lengthy list of *Gautreaux*-like litigation, see Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps To End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Programs*, 4 CITYSCAPE 194 (1999).

113. 425 U.S. 284 (1976).

114. Gautreaux v. Landrieu, 523 F. Supp. 665, 672 (N.D. Ill. 1981).

115. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989).

116. *Id.* at 491-92.

of society-wide discrimination."[117] Still, after *Adarand*, such policies are subject to strict scrutiny for a compelling government interest and narrow tailoring.[118] A court order under § 3613 for racial set-asides would thus have to survive both strict scrutiny and narrow tailoring analysis. Such an order potentially could meet one of two compelling government interests: remedying past discrimination or fostering an integrated, diverse society. I examine each of these interests below.

An order based on remedying past discrimination, under *Croson* and, more directly on point, *Milliken v. Bradley*[119] as interpreted in *Hills v. Gautreaux*,[120] cannot be based on general social trends, but rather requires specific illegal conduct by the government actor against which the order runs. Thus, in exclusionary zoning cases, the documented history of systemic discrimination by race on the part of the federal government in the housing market only will be relevant if the local government can be said to have participated in the discrimination. I concur with Professor Richard Thompson Ford that courts in civil rights litigation have too readily separated local government actions from state government actions, given that local governments are fundamentally creatures of the state.[121] And, though the traditional narrative of government discrimination in the housing market focuses on the federal government's discrimination against African Americans in mortgage insurance programs,[122] my own recent research shows that the states had a major role in this discrimination as well.[123] Still, most courts will likely interpret *Milliken* as requiring discriminatory action by local governments divorced from their role as components of a broader state government.

Within that framework, absent a successful claim of intentional discrimination,[124] the question then becomes whether a local government's exclusionary zoning practice is in itself sufficient to justify race-conscious remedial action. More generally, can past government action that has a disparate racial impact, but does not rise to the level of intentional discrimination, justify race-conscious remedies based on eliminating the effects of past discrimination? This question has not been reached to my knowledge in the Title VIII context, but has arisen since *Croson* in the Title VII context. In

117. *Id.* at 490.

118. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

119. 418 U.S. 717 (1974).

120. 425 U.S. 284, 298 (1976).

121. Richard T. Ford, *Law's Territory: A History of Jurisdiction*, 97 MICH. L. REV. 843, 921-22 (1999).

122. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 207 (1985).

123. Gordon, *supra* note 5.

124. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); United States v. City of Parma, 504 F. Supp. 913, 919 (N.D. Ohio 1980), *enforced by* United States v. City of Parma, 661 F.2d 562, 577 (6th Cir. 1981).

Newark Branch, NAACP v. Town of Harrison, the Third Circuit held that "the basis of a sound statistical analysis strongly suggestive of long-standing discriminatory impact" (here from a residency preference the Town of Harrison had used in hiring employees) met the *Croson* requirements of finding specific past discrimination.[125] As the court stated, "[when] the remedy is formulated to address this past discrimination, affirmative recruitment efforts mandated by the district court do *not* violate equal protection guarantees."[126] Similarly, a federal district court in another Title VII case against a government actor, *NAACP v. Town of East Haven*, found that race-based remedies are "properly based on conduct which, though not proven to have been overtly or intentionally discriminatory, is facially neutral but has a disparate impact on a particular group."[127]

Approval of any narrowly tailored race-based program as a remedy to disparate impact discrimination under Title VII should extend to Title VIII. Though the disparate impact standards for Title VII and Title VIII should lead to different analyses, as I have described, they still are based on similar underlying statutory language and purpose. Thus, it logically follows that if race-based remedies are available in disparate impact cases under Title VII, they should also be available in disparate impact cases under Title VIII.

Both *Harrison* and *East Haven* involved affirmative marketing remedies requiring outreach to African Americans, but not set-asides. These facts may lead to skepticism over whether disparate impact claims could support other race-based classifications. Indeed, this question remains unsettled law. One view suggests that post-*Croson*, strict scrutiny applies to any government racial classification by state and local governments. Both *Harrison* and *East Haven* occurred post-*Croson* in a local government context. Thus, the fact that courts approved an affirmative marketing program suggests that a more rigorous quota-based program in response to disparate impact discrimination would meet strict scrutiny as well, if such a program were the most narrowly tailored solution to that discrimination.

Judge Kozinski expressed the alternate view in a recent concurring opinion to a Ninth Circuit opinion upholding a program run by a Seattle school district with a similar structure to affirmative marketing programs.[128] The majority in that case applied strict scrutiny analysis, and found that the program survived it. Kozinski, in contrast, argued that certain kinds of race-based programs should be subject to rational basis review, not strict scrutiny. He admitted that such a reading runs against "the Supreme Court's strong admonition only last Term

125. Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 807 (3d Cir. 1991).

126. *Id.* at 808.

127. NAACP v. Town of East Haven, 998 F. Supp. 176, 187 (D. Conn. 1998).

128. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring).

that any and all racial classifications must be adjudged under the strict scrutiny standard of review."[129] However, he argued that the Supreme Court has never reviewed a race-based program that is not a "zero-sum" program—i.e., in which the racial classification means that one racial group will necessarily give up spaces to another group. He further argued that an affirmative marketing-type situation should be treated differently, because it does not deny benefits to anyone based on race, rather simply making certain racial groups aware of opportunities.[130] If Kozinski's view of affirmative marketing-type programs were upheld, then it would be possible to argue that disparate impact could justify affirmative marketing-based remedies, but not quotas.

Given the likely viability of justifying race-based remedies through past discrimination, it is probably unnecessary to consider whether the other compelling state interest for race-based policies, the *Grutter* diversity rationale, applies to Title VIII. Still, it is interesting and potentially useful to consider how *Grutter* might apply in the housing context. Though it is not yet clear if *Grutter* will reach beyond college admissions, there are positive portents. Several authors have suggested that *Grutter*'s rationale of society's need for citizens exposed to a diverse environment are more easily transferred to non-academic contexts than *Bakke*'s narrower academic freedom arguments.[131] The Seventh Circuit has already applied *Grutter* to a public employment case.[132] Further, one commentator already has suggested that *Grutter* might apply to residential diversity.[133] Title VIII intersects in a unique way with *Grutter* because the Supreme Court has recognized that Congress specifically intended Title VIII to foster residential integration.[134] Indeed, the Seventh Circuit, even before *Grutter*, upheld racial classifications in furtherance of the goal of integration, approving an affirmative marketing program as an appropriate remedy to concerns over neighborhood segregation.[135] Because *Grutter* legitimates social diversity as a compelling government interest sufficient to survive Equal Protection Clause strict scrutiny, and Congress has specifically

129. *Id.* at 1195.

130. A case in which the majority opinion used similar reasoning was *Allen v. Ala. State Bd. of Educ.*, 164 F.3d 1347, 1353 (11th Cir. 1999) (vacated on joint motion of the parties). *See also* Bowen Eng'g Corp. v. Vill. of Channahon, No. 02-C-7429, 2003 WL 21525254, at *6 (N.D. Ill. July 2, 2003).

131. *See, e.g.*, Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005); Eric A. Tilles, *Lessons from* Bakke*: The Effect of* Grutter *on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004); Jessica Bulman-Pozen, Note, *Grutter* at Work: A Title VII Critique of Constitutional Affirmative Action, 115 YALE L.J. 1408 (2006).

132. Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003); *see also* Bulman-Pozen, *supra* note 131.

133. Whitehead, *supra* note 106, at 395.

134. "Congress has made a strong national commitment to promote integrated housing." Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977) (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972)).

135. S. Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991).

chosen residential integration as a desired national policy for social diversity, courts should uphold narrowly tailored racial classifications in housing in furtherance of integration.

C. *Race-Conscious Remedies: Narrow Tailoring Framework*

Regardless of which of the two compelling state interests a race-based remedy satisfies, a particular remedy must be narrowly tailored to the problem. Moreover, that narrow tailoring will likely require a similar legal analysis, regardless of which compelling state interest is used to justify the remedy. For example, if the compelling state interest were in combating discrimination against African Americans (as shown by statistical proof of disparate impact), the appropriate remedy would be the most narrowly tailored one allowing African Americans sufficient access to housing in the town. If the compelling state interest were increased residential diversity in a town with few African Americans, the appropriate remedy would also be the most narrowly tailored one allowing African Americans sufficient access to housing in the town. One could imagine divergent cases—perhaps one could argue that there are different required "critical masses" for elimination of desegregation and diversity—but overall one would expect similar remedies in either case. However, there is some indication that remedies for the interest of diversity might be circumscribed by other aspects of the Fair Housing Act in ways that remedies for past discrimination might not, as I discuss further in this Section.

The combination of narrow tailoring and housing law yields two general principles. First, courts in any narrow tailoring case must pick the remedy that provides the least burdensome racial classifications while still meeting the desegregative goals of the Fair Housing Act. As a corollary, if remedies that do not involve racial classifications result in racial desegregation, such remedies will be preferred to those with racial classifications. Second, the Fair Housing Act may circumscribe certain quota-like remedies in housing cases, to an even greater degree than the Equal Protection Clause, thus limiting the remedies available to cases brought under that Act.

The *Walker* litigation, which resulted from segregation of public housing opportunities in Dallas, provides an example of the application of narrow tailoring in the housing context. There, a district court judge ordered construction of public housing in majority-white neighborhoods as a remedy to the history of discrimination.[136] The Fifth Circuit reversed, holding that, under *Adarand*, if non-race-based remedies existed that were likely to remedy the discrimination (here the provision of Section 8 housing vouchers without limiting their use to neighborhoods with a particular racial composition) they

136. Walker v. U.S. Dept. of Hous. & Urban Dev., 1997 WL 33177466 (N.D. Tex. Oct. 6, 1997).

must be employed.[137] Similarly, courts have suggested that if less intrusive race-based measures can further the relevant compelling state interest, they must be selected over more intrusive measures. Specifically, affirmative marketing and recruiting requirements, which attempt to increase racial diversity through providing increased outreach to minority groups, have been seen as less intrusive than quota-based systems.[138]

Courts have also indicated that the Fair Housing Act may place specific restrictions on quota-based systems in housing. It is unclear, however, whether courts find that the Act places additional restrictions beyond those of the Equal Protection Clause or whether such restrictions would apply to quotas designed to give minority groups increased access to housing. The Second Circuit invalidated a quota-based plan designed to prevent the Starrett City housing complex in Brooklyn from becoming all-black through the process of neighborhood tipping in *United States v. Starrett City Associates*.[139] Similarly, in *United States v. Charlottesville Redevelopment and Housing Authority*,[140] a Virginia district court struck down a quota-based system meant to maintain racial stability in a subsidized housing development. In striking down the quota system in *Charlottesville*, the court wrote, "[i]t is not that this court ascribes to integration a status inferior to nondiscrimination in the pantheon of legal values. It is, rather, that the duty to avoid discrimination must circumscribe the specific particular ways in which a party under the duty to integrate can seek to fulfill that second duty."[141]

Read liberally, this formulation might bar quota-based systems from being part of a remedy under the Fair Housing Act, even if quotas were the most narrowly tailored way to achieve a compelling government interest. However, neither *Starrett City* nor *Charlottesville* concerned exclusionary zoning, and so neither court considered two critical factors that distinguish exclusionary zoning from such cases and might justify broader relief, including quotas, in some scenarios. First, the *Starrett City* court noted that it was reviewing "ceiling quotas" to cap the number of minorities in a particular development, distinguishable from instances of an "access quota" which reserves a number of spots for minorities. In the former case, minorities bear the costs of promoting integration, while in the latter case whites bear the cost of promoting

137. Walker v. City of Mesquite, 169 F.3d 973 (5th Cir. 1999). Note that the program still selects the recipients of the vouchers on a racial basis, legally justified because those recipients were part of the class discriminated against by the Housing Authority.

138. *See, e.g.*, NAACP v. Town of East Haven, 998 F. Supp. 176, 187 (D. Conn. 1998) ("The relief sought does not request a quota, nor that specific jobs go to blacks, but rather it seeks an outreach program which would, hopefully, overcome the inhibitions which have discouraged qualified blacks from seeking Town employment in numbers representative of the makeup of the black community . . . . ").

139. 840 F.2d 1096 (2d Cir. 1988).

140. 718 F. Supp. 461 (W.D. Va. 1989).

141. Id. at 468.

integration. Thus the *Starrett City* court hinted that it might uphold access quotas in circumstances in which it would strike down ceiling quotas,[142] fitting with a more general trend of courts favoring access quotas over ceiling quotas.[143] In an exclusionary zoning context, minorities would receive quota spots, making the quotas "access quotas"—and *Starrett City* and *Charlottesville* might not control. Second, the only compelling government interest in *Starrett City* and *Charlottesville* was diversity or integration; both courts specifically found that the defendants had failed to adequately prove that their plans remedied past discrimination. Disparate impact exclusionary zoning cases by definition require statistical evidence of past discrimination. Thus, the *Charlottesville* court's argument that non-discrimination must "circumscribe" integration does not necessarily imply that non-discrimination must circumscribe remedial action.[144]

D. *Race-Conscious Remedies: What Will Actually Work?*

The critical question now becomes what the most narrowly tailored remedy is that would actually result in the end of the challenged zoning practice. If a non-race-based remedy, or a mild race-based remedy like affirmative marketing will suffice, then a more restrictive race-based remedy such as a quota would be unconstitutional.

A remedy that does not take race into account at all has little chance of actually producing racial integration in an exclusionary zoning case. As I have explained, in most circumstances, because of the lack of a better test, the absolute number of whites who will meet the qualification criteria for the housing will vastly exceed the absolute number of minorities who will meet those criteria.[145] This problem will not be ameliorated significantly even if the more complex metrics I suggest for proving a prima facie case, including wealth and credit, are employed.[146]

Affirmative marketing, a race-based remedy less restrictive than quotas, may provide an appropriate solution in some cases. However, we have already seen one cautionary tale of that strategy: Despite the affirmative marketing used in the AHMS-managed units resulting from the *Mount Laurel* litigation,

142. *Starrett City*, 840 F.2d at 1102.

143. *See* Michael F. Potter, Note, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance,"* 63 S. CAL. L. REV. 1151, 1230 (1990).

144. Even in a context in which the compelling state interest is integration, not remedying past discrimination, *Grutter* may suggest that more race-based remedies would be upheld today as compared to when *Charlottesville* was decided in 1989.

145. *See supra* Section III.D.

146. *See supra* Section IV.A. As more areas in America become majority-minority, this problem may lessen somewhat over time, but at present time low-income/low-wealth/bad-credit whites likely still outnumber low-income/low-wealth/bad-credit minorities in the vast majority of American metropolitan areas.

over eighty percent of suburban units still were given to whites. Another reason for caution comes from *United States v. City of Parma*,[147] a Title VIII case in which the Justice Department proved discriminatory intent in a zoning decision by a Cleveland suburb. There, the district court required "a comprehensive advertising program in newspapers which circulate principally in the black community in the region, as well as in the major regional newspapers .... [P]romoting Parma as a good place for persons of all races to reside."[148] But when the affirmative marketing campaign finally happened in 1988, only fifty-seven African Americans responded, in a county with 341,000 African Americans.[149] According to the 2000 census, fewer than 1000 African Americans live in Parma, a city of 85,000.[150]

From these programs, one can conclude at least that a basic level of affirmative marketing will not fulfill either of the compelling state interests: remedying past discrimination or furthering integration. It is possible, however, that more aggressive measures might work. One approach that could be tried, largely absent from the New Jersey program (and not relevant to the Parma program, where the new housing built was public housing), would be to require private developers who are constructing housing to conduct aggressive affirmative marketing themselves. Other approaches could include more intensive (and potentially more costly) marketing approaches, such as engaging in a wider range of forums than either the New Jersey or Parma programs required. One recent housing development built in Mount Laurel as a result of the original litigation there provides an example of what might be possible with affirmative marketing. In this program, strong outreach to minority communities has resulted in a development whose occupants are sixty-seven percent African-American and twenty percent Latino.[151]

Still, one development does not provide sufficient statistical justification for even aggressive affirmative marketing as an effective remedy for racial discrimination. Judges should thus, at the least, require extremely aggressive affirmative marketing and monitor the results of that marketing. In some circumstances, judges may be justified in concluding, using the best information available from the limited track record to date, that affirmative marketing is an insufficient response and that quotas are required.

---

147. United States v. City of Parma, 504 F. Supp. 913 (N.D. Ohio 1980), *enforced by* United States v. City of Parma, 661 F.2d 562, 577 (6th Cir. 1981).

148. *Id.* at 919.

149. Isabel Wilkerson, *Integration Proves Elusive in an Ohio Suburb*, N.Y. TIMES, Oct. 30, 1988, at 1A.

150. U.S. Census Bureau, U.S. Dep't of Commerce, American Factfinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited Apr. 21, 2006).

151. Div. of Civil Rights, State of N.J., 2005 Multiple Dwelling Reporting Form: Ethel R. Lawrence Homes I (2005) (on file with author); Div. of Civil Rights, State of N.J., 2005 Multiple Dwelling Reporting Form: Ethel R. Lawrence Homes II (2005) (on file with author).

One question remains: If affirmative marketing, or quotas, are going to be used to help meet the goals of Title VIII, how should courts deal with the dual actor problem? In projects by private developers, ultimately more of the responsibility for tenant or homebuyer selection will lie with the developer than with the town. The best answer is to incorporate these requirements into the zoning approvals granted by the court for the development. In cases like *Huntington* and *Sunnyvale*, the ultimate relief to the plaintiff comes in the form of a court order to change the town's zoning ordinance. Part of that order should alter the zoning of the relevant parcel to include affirmative marketing or quotas as a requirement for approval. Then, if developers fail to carry out these duties, they will be in violation of the zoning ordinance. In effect, because the town retains zoning authority over the developer, the court can avoid the dual actor problem by imposing a remedy on the town that imposes zoning obligations on the developers.

CONCLUSION

Extending the disparate impact reasoning of *Griggs* and subsequent Title VII cases to Title VIII provides a powerful avenue for challenging exclusionary zoning ordinances, which have otherwise been effectively foreclosed from challenge in federal courts. However, the doctrine developed in *Arlington Heights II* and *Huntington* for such cases does not ensure that remedies to exclusionary zoning will actually result in the racial integration envisioned by the authors of the Fair Housing Act, rather than simply greater housing opportunities for low-income whites. The prima facie case that courts have developed ignores the role of wealth and credit in the housing market. Moreover, current judicial remedies overlook both the multiple actor problem in which towns, lenders, and developers have different roles in the housing market with different standards of liability under Title VIII, and the large potential applicant class that results from the lack of a "better test" to replace income-segregative ordinances.

Courts should expand the scope of the disparate impact inquiry beyond questions of income to questions of wealth and credit; already *Sunnyvale* provides a good starting point for doing so. However, this change to the prima facie case would only likely result in minute gains for minorities. The most important reforms to Title VIII litigation that my research suggests are in the remedial phase. My research reinforces Professor Florence Wagman Roisman's thesis that "economics cannot be used as a proxy for race."[152] In exclusionary zoning cases, racial categorizations are absolutely necessary and constitutionally justified as means to accomplish the compelling state interests

152. Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 72 (2001).

of remedying past discrimination and furthering integration and diversity. The only question is which kinds of categorizations provide the most narrowly tailored solution to the problem. At the least, courts should require extremely aggressive affirmative marketing programs—far more aggressive than those found in *Mount Laurel* or *Parma*. Additionally, courts need to be open to the possibility that in some cases quotas may actually provide the most narrowly tailored solution. Exclusionary zoning is a powerful scourge on society. Given the complexities of the housing market, its elimination requires particularly powerful remedies.