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Racial Integration in Urban Public Housing: The Method Is Legal, the Time Has Come

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RACIAL INTEGRATION IN URBAN PUBLIC HOUSING: THE METHOD IS LEGAL, THE TIME HAS COME

I. INTRODUCTION

In 1984, the United States Attorney General (the government) sued Starrett City,[1] the nation's most populous housing development,[2] under Title VIII of the Civil Rights Act of 1968.[3] The government charged that Starrett City's practice of renting apartments under a racial quota system[4] violated sections 804(a), (b), (c), and (d) of that Act.[5] The district court granted summary judgment for the government,[6] and ordered the quota mechanism dismantled.[7] In March of 1988, a divided panel of the Second Circuit Court of Appeals affirmed the district court's decision.[8] Without its quota system to maintain racial integration, Starrett City is certain to become a segregated, minority development of nearly 20,000 and a substantial addition to New

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1. United States v. Starrett City Assocs., 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

2. Appellant's Brief at 15, *Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132). Starrett City is a privately owned development consisting of 46 high-rise buildings and 5881 apartments. Starrett's population numbers nearly 20,000. *Id.* at 6.

3. 42 U.S.C. §§ 3601-3631 [hereinafter "Title VIII," "the Fair Housing Act," or "the Act"].

4. The quota system at issue had been employed by Starrett since it first began renting apartments in 1974, and at the time suit was filed, provided for approximately 64% majority occupation and 36% minority occupation by rental unit. 660 F. Supp. at 672. For an in-depth review of the quota system, see *infra* notes 143-82 and accompanying text.

5. 42 U.S.C. § 3604 (1977) provides in part that:

> [I]t shall be unlawful—
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> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
>
> (c) To make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin . . . .
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

6. 660 F. Supp. at 679.

7. *Id.* (directing Starrett's management to adopt objective, colorblind tenant selection standards).

8. 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

York's urban problems.[9]

This Note will examine the Fair Housing Act and a wide spectrum of cases decided thereunder in order to define the mandates of that Act as they apply to public housing authorities. It will argue for the recognition of racial integration in housing as the single goal of Title VIII, and nondiscrimination as simply the ideal means by which integration should be attained.[10] The quota system at issue in *Starrett City*[11] will be cited as a necessary program of benign discrimination by which racial integration was maintained in the least intrusive way possible, given the racial imbalance of New York City's public housing projects.[12]

Moreover, this Note suggests that a citywide affirmative integration mechanism would serve—within constitutional and statutory limits—to open predominantly white housing developments to minorities and reduce minority demand for housing in developments that are already integrated. Such a plan will be recommended as a remedial measure to: (1) desegregate racially impacted projects of predominantly minority or majority character; (2) maintain integration in racially balanced developments while desegregation at others proceeds; and (3) create a self-sustaining pattern of racially balanced public housing.

II. The Fair Housing Act of 1968

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act,[13] was introduced on the Senate floor as an amendment to the Civil Rights Act of 1968. After passage in the Senate, the Act became mired in the House Rules Committee with no indication that it would be passed at all.[14] Upon the assassination of Dr. Martin Luther King, however, turmoil in Washington, D.C. and throughout the country forced the House to take action and propelled the Act to an expeditious passage on the House floor, without amendment and

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9. Appellant's Brief at 14, United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132) (citing affidavit of R. Rosenberg, managing director of Starrett City, at ¶¶ 88-92; JA 00391-392 (minorities outnumber whites on the waiting list for admission to Starrett City by roughly four to one, and whites consistently leave Starrett at a faster rate than do blacks)). *See infra* text accompanying notes 154-56 (as the minority population increases, whites are expected to move out in ever increasing numbers, hastening the process of racial transition and resulting in nearly complete racial segregation).

10. *See infra* notes 183-206 and accompanying text.

11. *See infra* notes 143-82 and accompanying text.

12. The fact that Starrett City is a privately owned development in no way detracts from its utility for this purpose.

13. 42 U.S.C. §§ 3601-3631 (1982).

14. Note, *Justifying A Discriminatory Effect Under The Fair Housing Act: A Search For The Proper Standard*, 27 UCLA L. Rev. 398, 426-27 n.136 (1979).

practically without debate.[15] As a result of Title VIII's birth as a floor amendment in the Senate and the circumstances surrounding its passage, there are no available committee reports from which to discern the intent of its framers. The legislative history of the Act consists solely of recorded statements made during the limited debate preceding its enactment,[16] and many of these statements indicate that the principle goal of the legislators was to eradicate segregation in housing patterns.[17]

Senator Mondale, the original sponsor of Title VIII, proclaimed during the debates that "one of the biggest problems we face is the lack of experience in actually living next to [n]egroes,"[18] and that we must not "live separately in white ghettos and [n]egro ghettos."[19] The result of the Act, he claimed, would be that "rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns."[20] Senator Brooke decried the fact that "an overwhelming proportion of public housing . . . in the United States directly built, financed[,] and supervised by the Federal Government—is racially segregated."[21] "[O]ur Government," Senator Brooke concluded, "unfortunately, has been sanctioning discrimination in housing throughout this nation."[22]

Included in Title VIII's legislative history are broad statements denouncing all discrimination in the sale or rental of housing,[23] which courts have invoked to prevent both clever and thoughtless people

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15. *Id.*

16. 840 F.2d at 1101.

17. Note, *The Fair Housing Act of 1968: Its Success and Failure*, 9 SUFFOLK U.L. REV. 1312 n.1 (1975). In its quest to pass a fair housing law, Congress was informed by the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The report concluded that racial discrimination in housing has created the inner-city ghetto, "where segregation and poverty combine 'to destroy opportunity and hope and to enforce failure.' " *Id.* at 1312 (quoting the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS at 203-04 (1968)); *see also* Note, *Tipping the Scales of Justice*, 90 YALE L.J. 377, 384 (1980) ("The legislative history of Title VIII . . . indicates that a primary congressional intention in passing the legislation was to break up residential concentrations of minorities and to foster integrated living patterns."); *Recent Cases*, 85 HARV. L. REV. 870, 873-74 (1972) ("[e]limination of discrimination was not the only goal of the proponents of the fair housing amendments. Indeed, their major goal was to provide integration opportunities to racial minorities, thus affording them the chance to escape the ghetto if they so desired").

18. 114 CONG. REC. 2275 (1968).

19. *Id.* at 2276.

20. *Id.* at 3422.

21. *Id.* at 2528.

22. *Id.* at 2281.

23. Senator Mondale stated at one point that "we do not see any good reason or justification, in the first place, for permitting discrimination in the sale or rental of housing." *Id.* at 5642.

from avoiding the strictures of the Act.[24] Courts have proclaimed what Congress undoubtedly recognized, that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme,"[25] and that as bigoted behavior has become more universally condemned, evidence of discriminatory intent has become harder to find.[26] Thus, a Title VIII violation may occur if a given practice has a discriminatory effect regardless of intent.[27] This fact is extremely important if the Act is to achieve its integrative purpose, because "imposing an intent requirement would deprive the statute of almost all impact on de facto segregation."[28]

In drafting Title VIII, Congress regrettably failed to provide a definition of discrimination. Neither did it prescribe a standard by which to determine when a discriminatory or disproportionate effect is justifiable for benign (integrative) purposes.[29] An examination of various cases is useful to illustrate the ways in which courts have construed the antidiscrimination provisions of the Act to achieve the goal of racial integration.

The cases are classified under three headings and presented chronologically within each heading. The classifications are based on whether the Act was invoked to:

(1) enjoin construction of low or middle income housing to prevent perpetuation or creation of racial segregation;

(2) compel placement of low or middle income housing in predominantly white areas to combat segregative discrimination; or

(3) to allow some deprivation of housing for minorities in order to prevent "tipping" the racial balance of an area toward minority concentration.[30]

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24. Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974) (noting that "the statutes prohibit all forms of discrimination, sophisticated as well as simple minded").

25. Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

26. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). For a discussion of *Arlington Heights*, see *infra* notes 64-81 and accompanying text.

27. *See, e.g.*, NAACP v. Town of Huntington, 844 F.2d 926, 934-36 (2d Cir. 1988), *reh'g denied*, 109 S. Ct. 824 (1989) (discussed *infra* notes 105-25 and accompanying text); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (discussed *infra* notes 49-55 and accompanying text); Resident Advisory Board v. Rizzo, 425 F. Supp. 987, 1021-24 (E.D. Pa. 1976), *aff'd*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (discussed *infra* notes 56-63 and accompanying text).

28. Note, *supra* note 14, at 406 (citing *Rizzo*, 564 F.2d at 147-48; *Arlington Heights*, 558 F.2d at 1289-90).

29. *See generally* Note, *supra* note 14.

30. These categories are not intended to encapsulate completely the cases examined;

III. Enjoining Construction To Prevent Segregation

In *Shannon v. United States Department of Housing and Urban Development*,[31] the Department of Housing and Urban Development (HUD) approved an urban renewal plan to construct subsidized housing in an area of Philadelphia containing a high concentration of low income, minority residents. Civic organizations comprised of both white and black residents of the renewal area brought suit under the Housing Act of 1949 seeking an injunction against the execution of a contract for rent supplement payments.[32] The trial court dismissed plaintiffs' complaint for failure to state a claim,[33] and the Third Circuit Court of Appeals reversed.[34]

That court noted that under the Housing Act of 1949, HUD could not contract to provide federal financial assistance in the absence of

> [A] workable program for community improvement (which shall include an official plan of action . . . for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community . . . suitable . . . for adequate family life) for utilizing appropriate private and public resources to eliminate and prevent the development or spread of, slums and urban blight . . . .[35]

Turning to Title VI of the Civil Rights Act of 1964 and the Fair Housing Act of 1968, the court concluded that:

> In 1949[,] the Secretary [of HUD] . . . could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed . . . to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing.[36]

Because the proposed housing would lead to the maintenance of or an increase in racial and socio-economic concentration, the construction plan was prima facie unacceptable under HUD guidelines[37] and viola-

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overlap between them is inevitable. The categories are utilized only as a framework in which to present cases and are sufficiently broad to accommodate virtually every case involving public housing and the Act.

31. 436 F.2d 809 (3d Cir. 1970).

32. 305 F. Supp. 205 (E.D. Pa. 1969).

33. *Id.*

34. 436 F.2d at 809.

35. *Id.* at 813 (citing The Housing Act of 1949, § 101(c), 42 U.S.C. § 1451(c)(1) (42 U.S.C. § 1451(c)(1) omitted pursuant to 42 U.S.C. § 5316 (Supp. V 1987)).

36. *Id.* at 816.

37. *Id.* at 820 (quoting the Department of Housing and Urban Development, *Low*

tive of the *antidiscrimination* provisions of the Act.[38]

Blackshear Residents Organization v. Housing Authority of the City of Austin[39] similarly focused on the spread of segregation and blight. The plaintiffs were minority citizens, both as individuals and as an organization, seeking to enjoin the Austin Housing Authority and HUD from building a public housing project that would perpetuate racial segregation.[40] The district court found that the Housing Authority, with the knowledge and aid of HUD, had created and maintained a racially segregated system of public housing.[41]

Like the *Shannon* court,[42] the judge equated increased segregation with discrimination by reading the provision of Title VI that "[n]o person . . . shall . . . on the ground of race . . . be subjected to discrimination under any program or activity receiving [f]ederal financial assistance,"[43] together with Title VIII's requirement that HUD "administer the programs and activities . . . in a manner affirmatively to further the open housing policy declared by the Act in 42 U.S.C. [section] 3601."[44] The court then turned to HUD's internal regulations[45] governing site selection for public housing projects, which provided in pertinent part that:

> The aim of a local authority in carrying out its responsibility for site selection should be to select from among sites . . . which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be prima facie unacceptable and will be returned to the Local Authority for further consideration . . . .[46]

Rent Housing Preconstruction Handbook, RHA 7410.1, § 4, ¶ (g)) ("[a]ny proposal to locate housing only in areas of racial concentration will be prima facie unacceptable and will be returned to the Local Authority for further consideration.") [hereinafter *Low Rent Housing Preconstruction Handbook*, RHA]

38. *Id.* Rather than treating discrimination and segregation as separate inquiries, the *Shannon* court equated the perpetuation or creation of racial segregation with discrimination, stating that an "increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." *Id.* at 821.

39. 347 F. Supp. 1138 (W.D. Tex. 1972).

40. *Id.*

41. *Id.* at 1140-42.

42. *See supra* notes 31-38 and accompanying text.

43. 347 F. Supp. at 1146 (quoting the Civil Rights Act of 1964, 42 U.S.C. § 2000(d)).

44. *Id.* (citing 42 U.S.C. § 3608(e)(5)).

45. *Low Rent Preconstruction Handbook*, RHA 7410.1.

46. 347 F. Supp. at 1146 (quoting *Low Rent Preconstruction Handbook*, RHA 7410.1,

Because neither the Housing Authority nor HUD properly considered factors relating to the racial character of the proposed site,[47] they were enjoined from proceeding with the proposed project.[48]

IV. Compelling Specific Placement To Combat Segregation

In 1974, the Eighth Circuit decided *United States v. City of Black Jack*,[49] striking down a city zoning ordinance prohibiting the construction of a subsidized housing project. The site chosen for the proposed development was in a "virtually all white" area of St. Louis County, and immediately following HUD's approval of the construction plan, the zoning law was passed.[50] The court found that by prohibiting the construction of housing in which "many blacks would [have lived]," the ordinance served to perpetuate the racial segregation "so antithetical to the Fair Housing Act."[51]

By showing that the ordinance produced a discriminatory (segregative) effect, the minority plaintiff class established a prima facie case under Title VIII[52] and was held entitled to prevail unless the city proved that the ordinance was necessary to further a compelling government interest.[53] The court adopted a three-part test under which it

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ch. 1, § 1(2)(g)).

47. *Id.* at 1148.

48. *Shannon* and *Blackshear* demonstrate the early use of Title VIII to remedy discriminatory site selection for subsidized housing projects. The injunction in each case ideally would create a two-fold benefit by: (1) preventing increased segregation in the area originally selected; and (2) encouraging development in an area of high or predominant majority population.

49. 508 F.2d 1179 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974).

50. *Id.* at 1182-83. At the time of the suit, the area chosen for location of the development had a black population of approximately 1.5%, and stood in stark contrast to other, predominantly black parts of the St. Louis area.

51. *Id.* at 1186. The court observed that by prohibiting the construction of low-to-moderate income housing in Black Jack, the ordinance had the effect of foreclosing "85% of the blacks living in the metropolitan area from obtaining housing in Black Jack." *Id.*

52. *Id.* The Eighth Circuit first allocated the burden of proof in a Title VIII action by the "prima facie case" method expressed in Williams v. Matthews Co., 499 F.2d 819, 824-26 (8th Cir. 1974). Under this standard, a plaintiff need not show that racial discrimination was intended, but only that the conduct of the defendant has a discriminatory effect.

53. 508 F.2d at 1186. The court was clearly unwilling to hold that every action having a discriminatory effect violates the Fair Housing Act. While noting that its decision was based on Title VIII, and not the equal protection clause, *id.* at 1185 n.4, the court adopted the test of "strict scrutiny" that a defendant must satisfy to successfully rebut a plaintiff's prima facie case. *Id.* Strict scrutiny is seen most frequently in equal protection challenges to statutes creating "suspect classifications," *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Korematsu v. United States, 323 U.S. 214 (1944), or interfering with "fundamental rights." *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942).

considered:

> [F]irst, whether the ordinance in fact further[ed] the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated government interest may be attained.[54]

The interests put forth by the city failed to pass even the first part of the test. The court concluded that none of the proposed justifications—traffic control, the prevention of overcrowding in the schools, and prevention of depreciation in the value of surrounding homes—were furthered by the ordinance. The city was ordered to allow the housing project to be built as planned.[55]

In *Resident Advisory Board v. Rizzo*,[56] the Third Circuit compelled construction of subsidized housing in order to promote integration. In *Rizzo*, public housing residents, both as individuals and as an organization, brought suit against the Philadelphia Housing Authority and HUD for failing to build a housing project approved for construction nine years earlier in a predominantly white area of the city.[57] The Third Circuit rejected the plaintiffs' equal protection claim[58] and the *Black Jack* analysis used by the district court to find a Title VIII violation.[59] Instead, Judge Garth set forth a new test for justifying a discriminatory effect under the Act.[60] Title VIII criteria, the court opined,

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54. 508 F.2d at 1186-87 (citation omitted). Although the *Black Jack* court referred to this test as an equal protection standard, it was, in fact, taken from Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972), an employment discrimination case brought under Title VII of the Civil Rights Act of 1964.

55. *Id.* at 1187-88 (court found that defendant city denied housing on the basis of race in violation of section 3604(a) of Title VIII, and impeded the exercise of the right to equal housing opportunity guaranteed by section 3617).

56. 564 F.2d 126 (3d Cir. 1977), *aff'g* 425 F. Supp. 987 (E.D. Pa. 1976).

57. The development site at issue was selected in 1968. The decision generated intense hostility and opposition, becoming a significant issue in the 1971 mayoral race. In 1971, Mayor Rizzo, who campaigned on the promise to "preserve the neighborhoods . . . at any expense," explained the public outcry by stating that public housing was black housing, and declaring that projects should not be placed in white neighborhoods because whites did not want blacks as neighbors. 425 F. Supp. at 1001.

58. 564 F.2d at 146.

59. *Id.* at 148 (" '[c]ompelling interest' analysis is not a part of Title VII doctrine, and we conclude that this heavy burden should be reserved not for Title VIII defendants, but for those who seek to justify denials of equal protection by *purposeful* discrimination") (emphasis in original).

60. *Id.* at 149-50. The court prefaced enunciation of its standard by recognizing the inherent differences between housing discrimination and employment discrimination. Qualities relevant to job performance were held easier to identify and quantify than criteria which could justify a discriminatory housing practice.

were best determined on a "case-by-case basis" by considering whether the "justification . . . serve[s] . . . a legitimate, bona fide interest of the Title VIII defendant," and whether "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[61]

The defendants offered no justification for their refusal to build the development, a refusal which perpetuated racial segregation and had a disproportionate adverse effect on blacks.[62] The defendants were therefore held to have violated Title VIII and the plaintiffs received judgment.[63] Similar to the violation and remedy in both *Black Jack* and *Rizzo* were those of *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.[64] In *Arlington Heights*, a corporate plaintiff petitioned the defendant—the Village of Arlington Heights—to rezone the plaintiff's property to permit construction of a low income housing project. When the petition was denied, the plaintiff filed an action for injunctive relief, claiming that the village's refusal was racially discriminatory and violative of both the equal protection clause and the Act.[65] The district court, without distinguishing between the constitutional and statutory claims, held that the zoning decision did not disproportionately affect minority group members.[66] In addition, the court found that the decision had been motivated not by racial animus, but by a desire to protect property values.[67]

The Seventh Circuit reversed, finding a disproportionate effect without a compelling justification and hence, a violation of the equal protection clause.[68] The Supreme Court then reversed the Seventh Cir-

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61. 564 F.2d at 149.

62. The district court found that 85% of those waiting for public housing in Philadelphia were black. Because these applicants were generally unable to move out of the racially impacted areas of the city, cancellation of the project had the discriminatory effect of depriving them of "a unique opportunity . . . to live in an integrated, non-racially impacted neighborhood . . . ." 425 F. Supp. at 1018.

63. The court examined the legislative history of the Act and declared it clear that Congress was aware of the refusal of certain communities to accept low income housing, which refusal added to the inability of low income blacks to escape their "slum ghettoes." Thus, "in an effort to end segregation in public housing[,] Congress enacted § 3608(d)(5), requiring affirmative action by HUD and HUD-assisted agencies to cure this . . . problem." *Id.* at 1014-15.

64. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

65. 373 F. Supp. 208 (N.D. Ill. 1974).

66. *Id.* at 211.

67. *Id.*

68. 517 F.2d 409, 412-15 (7th Cir. 1974). The refusal to rezone the land prevented construction of low income public housing, where more blacks than whites were eligible to reside. The refusal thus resulted in a greater housing deprivation for blacks. The court also studied the history of the village and found an established pattern of racially segregated housing. The village had taken no affirmative steps toward integration. *Id.*

cuit[69] on the ground that the standard put forth by the Court in *Washington v. Davis*[70] requires proof of discriminatory intent in order to establish an equal protection violation.[71] Finally, on remand, the Seventh Circuit formulated a four-factor test for deciding "under what circumstances conduct that produces a discriminatory impact but which was taken without discriminatory intent will violate [the Fair Housing Act]."[72]

The four factors specified were:

(1) the strength of the plaintiff's showing of discriminatory effect;

(2) whether the plaintiff adduced some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*;

(3) the defendant's interest in taking the action complained of; and

(4) whether the plaintiff was seeking to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[73]

In assessing the first factor, the court noted two possible types of discriminatory effect—a disproportionate adverse impact on a particular racial group and the adverse effect on a community due to main-

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69. 429 U.S. 252 (1977).

70. 426 U.S. 229 (1976).

71. *Id.* at 242. The Court held in *Davis* that proof of discriminatory intent is necessary to establish an equal protection violation. Many actions brought prior to 1976, however, alleged both Title VIII and equal protection clause violations, and were decided by courts which failed to distinguish between the causes of action. *See, e.g.*, Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972) (because the Fair Housing Act obliges housing authorities to affirmatively combat discriminatory housing practices, failure to consider racial criteria in selecting project sites violates the fourteenth amendment), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973); Kennedy Park Homes v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970) (actions taken by city officials, whether thoughtless or intentional, prevented construction of a low income housing project and thus violated plaintiffs' right to be free from state discrimination), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

Although the precedential value of these cases for equal protection purposes was destroyed by the Court's explication in *Davis*, discriminatory effect remained sufficient to establish a Title VIII violation. *See generally* Note, *supra* note 14, at 402 (examining early decisions under Title VIII and the differing standards which evolved for equal protection and Title VIII actions).

72. 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

73. *Id.*

tained or increased segregation.[74] The zoning decision was held to have had an unclear segregative effect due to the heterogeneous racial composition of the disadvantaged class[75] and the existence of other land in the area zoned for low income housing.[76] The second and third factors favored the defendant village; no proof of discriminatory intent was adduced,[77] and the village was acting within the scope of its authority when it made the zoning decision.[78] The fourth factor—the nature of relief sought—was in the plaintiff's favor. Plaintiffs sought only a court order to allow promotion of "the congressionally sanctioned goal of integrated housing."[79]

The court thus remanded the case to the district court for findings on the issue of discriminatory (segregative) effect,[80] instructing that, if the court found for the plaintiffs on this factor, relief should be granted, because the courts "must decide close cases in favor of integrated housing."[81]

In 1987, the Second Circuit compelled specific placement of subsidized housing in *United States v. Yonkers Board of Education*,[82] where the United States, joined by the NAACP and a class of minority plaintiffs, brought suit against the City of Yonkers and its Community Development Agency (CDA). The complaint alleged that the city and the CDA had intentionally fostered racial segregation by strategic placement of subsidized housing,[83] and the district court held for the

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74. *Id.* These two types of discriminatory effect are brought into direct conflict where—as at Starrett City—a racial quota denies housing to minorities to maintain integration. Integration is promoted at the expense of a single racial group. *See infra* notes 157-63 and accompanying text.

A citywide integration mechanism in subsidized housing projects would not suffer this infirmity, however, as each race would share the burden of the integration plan and no community would suffer increased segregation. *See infra* notes 218-27 and accompanying text.

75. 558 F.2d at 1291. The court distinguished the class of people harmed by the ordinance, estimated to be 60% majority and 40% minority, from the plaintiff class in *Rizzo*, which was 95% minority. *Id.*

76. *Id.*

77. *Id.* The court referred to this factor as the least important of the four.

78. The court noted that where a "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." *Id.* at 1293 (citing Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867, 876-77 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977)).

79. *Id.*

80. The case was settled immediately following the remand, obviating the need for further judicial findings. A consent decree under which the village agreed to acquire adjacent property and rezone it in conformance with a modified version of the construction plans was entered into and approved by the court. 469 F. Supp. 836 (N.D. Ill. 1979).

81. *Arlington Heights*, 558 F.2d at 1294.

82. 837 F.2d 1181 (2d Cir. 1987).

83. *Id.* at 1185. The plaintiffs claimed that defendants had enhanced segregation in violation of both the Fair Housing Act and the equal protection clause of the fourteenth

plaintiffs in an exhaustive opinion.[84]

The court found that the City of Yonkers was dramatically segregated and that virtually all low income subsidized housing was in or bordering a single area of minority concentration.[85] Searching for the causes of the racial distribution pattern, the court examined the city's subsidized housing decisions from 1948 until the time of the suit.[86] It concluded that racial segregation in Yonkers had been caused by the city's discriminatory selection of subsidized housing sites.[87] The court rejected the city's denials of responsibility for the segregation problem, finding that HUD had repeatedly urged geographically dispersed housing projects for Yonkers—a suggestion the city ignored at the risk of losing federal subsidies.[88] Further, the minority community had actively sought for decades to move to the white areas of the city—areas which developers considered ideal for public housing.[89]

Although the vehement community opposition that greeted each integrative proposal was often couched in economic or other race-neutral terms, the court found abundant evidence that the objections, while not "based *wholly* upon race," were at least "significant[ly]" born of racial animus.[90] City officials acceded to the discriminatory will of the constituency and at times "led the fight against subsidized housing in East Yonkers."[91] The court thus found violations of both the equal protection clause and the Act, and ordered the city to submit an affirmative, integrative Housing Assistance Plan to HUD, subject to court approval.[92]

The Second Circuit affirmed the judgment[93] over the city's claim that the lower court erred by:

> (1) ruling, in effect, that it had an obligation to build subsidized housing outside of [the predominantly minority area of] Yonkers;
> (2) finding that the [c]ity's housing decisions were made with

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amendment. The issues raised regarding racial segregation in the Yonkers school system are unnecessary for purposes of this note and will not be addressed.

84. 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert denied*, 108 S. Ct. 2821 (1988).

85. *Id.* at 1369. At the time of the suit Yonkers was comprised of three geographic areas, two of which were largely white, the third of which was predominantly minority. *Id.* at 1364-65.

86. *Id.* at 1369-73.

87. *Id.*

88. *Id.* at 1323, 1347, 1356.

89. *Id.* at 1300, 1332-33.

90. *Id.* at 1371 (emphasis in original).

91. *Id.* at 1373.

92. 635 F. Supp. 1577, 1580 (S.D.N.Y. 1986).

93. 837 F.2d 1181 (2d Cir. 1987).

> the intention and the effect of perpetuating housing segregation; and
> (3) holding the [c]ity liable for making decisions that merely responded to the wishes of its citizens.[94]

Judge Kearse, the author of the opinion, began by distinguishing the equal protection claim—which requires proof of discriminatory intent—from the Title VIII claim, which is established by a showing of discriminatory effect.[95] Judge Kearse observed, however, that in light of the abundant proof of discriminatory intent on the record, the Title VIII standard was "immaterial."[96]

In addressing the appellants' first challenge, the court stated that although municipalities are under no general obligation to provide subsidized housing, once they decide to do so, they may not proceed with either segregative intent or effect.[97] Judge Kearse easily concluded that Yonkers was a segregated city and that the district court had correctly identified a nexus between this segregation and the city's policy of locating subsidized housing exclusively within its single minority area.[98] In addition, Judge Kearse agreed with the expert testimony that "by concentrating subsidized low-income housing in the minority areas of Yonkers, the [c]ity had 'stigmatized' those neighborhoods and thereby made them both less likely to attract new white families and less likely to retain the white families already there."[99]

The court quickly disposed of the city's claim that its housing decisions were made without discriminatory intent, stating that "[g]iven even that fraction of the proof recited here as to the impact of the [c]ity's decisions, the sequences of events, the procedural deviations, the convenient disregard of substantive standards, and the explicit and veiled statements of racial concerns, we regard as frivolous the [c]ity's contention . . . ."[100]

The city's final, two-fold argument—that it was entitled to prevail because its housing decisions expressed the will of its citizens and race was not the citizens' primary concern—was summarily rejected. The court first noted that the record belied the city's claim that its officials were "mere puppets [] of their constituencies."[101] It then rejected the city's "doctrinal contention that elected officials may lawfully act with

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94. *Id.* at 1216.
95. *Id.* at 1216-17.
96. *Id.* at 1217.
97. *Id.* at 1219 (citing Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (discussed *infra* notes 130-42 and accompanying text).
98. *Id.*
99. *Id.* at 1220.
100. *Id.* at 1222.
101. *Id.* at 1223.

the purpose of achieving or preserving racial segregation in response to the urgings of their constituents so long as race is 'only' a significant, but not a dominant, factor in the constituents' motivation."[102] The equal protection clause, Judge Kearse observed, forbids the manifestation of community biases in official policy. Rather, "the [c]ity may properly be held liable for the segregative effects of a decision to cater to this 'will of the people.' "[103] The remedy devised by the district court was upheld as narrowly tailored and within the discretion of the ordering court.[104]

Finally, in 1988, the Second Circuit forcefully restated its commitment to racially integrated housing in *NAACP v. Town of Huntington*.[105] The plaintiffs in *Huntington* sued the town to compel amendment of a zoning ordinance which restricted subsidized housing projects to a predominantly black urban renewal area.[106] The district court, applying an intent-based standard, found for the defendants,[107] and the Second Circuit reversed.[108]

The court first noted that Huntington had a shortage of low to moderate income housing.[109] Because more blacks than whites in the community were eligible for such housing, the impact of the housing shortage on blacks was disproportionately great.[110] Judge Kaufman, writing for the court, held that the district court erred by ruling that plaintiffs had "failed to make the requisite prima facie showing of discriminatory effect," and that "even if they had demonstrated discriminatory effect, the city had rebutted it by articulating legitimate, nonpretextual justifications."[111]

The court embraced the discriminatory effects or impact standard as the proper threshold consideration in Title VIII inquiries,[112] and re-

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102. *Id.* at 1223-24.

103. *Id.* at 1226.

104. *Id.* at 1236-37.

105. 844 F.2d 926 (2d Cir. 1988).

106. Action was first brought under the equal protection clause and the Fair Housing Act. Appellants abandoned their equal protection claim on appeal. *Id.* at 928 n.1.

107. 668 F. Supp. 762 (E.D.N.Y. 1987).

108. 844 F.2d at 926, *aff'd*, 109 S. Ct. 276 (1988).

109. *Id.* at 929.

110. *Id.* In response to the local need for additional subsidized housing, Housing Help, Inc. (HHI) had agreed to sponsor an integrated low income housing project. HHI sought a construction site in a predominantly white area of Huntington to avoid enhancing the community's racial imbalance. It located an apparently ideal site and requested that the Town Board rezone the property to permit construction. The Town reviewed the proposal and, at the behest of a vocal and demonstrative group of citizens, refused to rezone. *Id.* at 932.

111. *Id.* It is unnecessary for purposes of this Note to address the court's finding that plaintiffs made a proper application for rezoning.

112. *Id.* at 934-35 (citing precedent and drawing parallels between Title VIII and Title VII objectives and standards of proof).

jected the district court's use of the *Arlington Heights* test[113] (designed to determine whether a given discriminatory effect is *justified*) to determine whether the plaintiffs had *established* a prima facie case.[114] Judge Kaufman also found error in the lower court's failure to consider both types of discriminatory effect identified by the *Arlington Heights* court: disproportionate impact on a particular racial group and adverse effect on the community by the perpetuation of segregation.[115] Since the town's refusal to rezone disproportionately deprived blacks of new housing and served to perpetuate existing segregation,[116] the court found a clear prima facie violation and proceeded to formulate a test by which it evaluated the town's interest in the zoning restriction in light of the adverse effects it created.[117]

Judge Kaufman began with the *Rizzo* test,[118] under which "the defendant must prove that its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[119] He then added two factors borrowed from the *Arlington Heights*[120] test: whether any evidence of discriminatory intent had been adduced, and whether the plaintiff was suing to compel defendant to construct housing or merely to remove an obstacle to plaintiff's own building plans.[121] Applying this combined test to the town's numerous purported justifications,[122] the court held each to be either "weak and inadequate"[123] or attainable by less discriminatory means.[124] Having determined that a Title VIII violation

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113. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (discussed *supra* text accompanying notes 72-73).

114. 844 F.2d at 935-36.

115. *Id.* at 937-38. *See supra* text accompanying note 74.

116. Judge Kaufman emphatically corrected the district court's failure to address the issue of maintained or enhanced segregation. It was unacceptable, in his view, to focus only on the harm caused to blacks when the "principle purpose of Title VIII [was] to promote 'open, integrated residential housing patterns.' " *Id.* at 937 (quoting Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973)).

117. *Id.*

118. 564 F.2d 126 (3d Cir. 1977), *aff'g* 425 F. Supp. 987 (E.D. Pa. 1976). For a discussion of the *Rizzo* test, see *supra* text accompanying note 61.

119. 844 F.2d at 936.

120. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *see also supra* notes 64-81 and accompanying text.

121. 844 F.2d at 936.

122. *Id.* at 940. In addition to claiming that it sought to encourage new housing construction in the urban renewal area by forbidding it elsewhere, the town supervisor set forth as justifications: (1) inconsistency with the town's housing plans; (2) inconsistency with zoning; (3) traffic considerations; (4) parking and fire protection problems; (5) proximity to a railroad and LILCO plant; (6) inadequate recreation areas; and (7) undersized units. *Id.*

123. *Id.*

124. *Id.* at 939.

had occurred, the court ordered the town to rezone the property and allow the plaintiffs to develop their project free from restriction.[125]

V. Allowing Deprivation To Prevent "Tipping"

Decisions which compel specific placement of subsidized housing over public resistance (normally in the form of an exclusionary zoning ordinance) illustrate the continuing commitment of the circuit courts to urban racial integration. Exclusionary zoning—like discriminatory site selection—involves official as well as private discrimination. Private biases, however, pose the greatest threat to the goal of Title VIII because of their potential to create or maintain segregation without violating the Act. The following two cases involve efforts to ameliorate the segregative effects of private prejudice.

Before presenting cases which have recognized the "tipping" phenomenon, it is instructive to define the term. Tipping is a process of residential resegregation: as blacks move into a predominantly white neighborhood, the neighborhood becomes temporarily integrated. The "integration," however, often reveals itself to have been simply a period of racial transition, as whites flee, leaving a predominantly black neighborhood.[126] The tipping point refers to the approximate percentage of minority residents a particular neighborhood will absorb before "white flight" occurs on a large-scale basis. Sociologists claim that every neighborhood has its own, specific tipping point beyond which "white flight" will occur.[127]

One of the most prominent tipping theories posits that a neighborhood's tipping point is a function of the "personal tipping points" of its residents.[128] A personal tipping point is the point at which an individual will move from a neighborhood on account of increased minority residence. The two most important factors in the tipping process, according to this model, are personal attitudes toward interracial living, and sufficient, sustained black demand for housing.[129]

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125. *Id.* at 940-41.

126. Note, *Tipping the Scales of Justice*, *supra* note 17, at 378; *see also* Aldrich, *Ecological Succession in Racially Changing Neighborhoods*, 10 Urb. Aff. Q. 327 (1975). Numerous courts have recognized the tipping phenomenon as well. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705, 718-20 (2d Cir. 1979) (tipping point in public school context a valid consideration in devising a desegregation plan); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (use of racial access quota in public housing project upheld to prevent neighborhood tipping); Zuch v. Hussey, 394 F. Supp. 1028, 1049 (E.D. Mich. 1975) (describing the course of resegregation in a residential neighborhood), *aff'd*, 547 F.2d 1168 (6th Cir. 1977). For a discussion of *Otero*, see *infra* notes 130-42.

127. Note, *Tipping The Scales Of Justice*, *supra* note 17, at 379.

128. *Id.* at 379-80 n.11.

129. *Id.*

The Second Circuit recognized the tipping phenomenon in *Otero v. New York City Housing Authority*.[130] In *Otero*, 1852 mostly non-white families were removed from an area of Manhattan undergoing renewal sponsored by the New York City Housing Authority (NYCHA).[131] NYCHA regulations guaranteed the displaced families first priority in the housing being constructed, but when leases for the 360 new apartments became available, a larger number of the former occupants than was expected applied for admission. Concerned that granting the returning tenants first priority would create a "racial imbalance in the project and in the surrounding community,"[132] NYCHA ignored its own regulation and rented only 40% of the new units to non-white former residents.[133] The remaining 60% were rented to white applicants.[134] The former occupants who were denied apartments sued the Housing Authority under the Fair Housing Act and were granted summary judgment by the district court.[135]

The issue on appeal was whether the NYCHA's commitment to maintain integration (deter tipping) in the renewal area could justify its breach of regulation and the resultant burden upon former site occupants. The parties agreed that the project would become approximately 80% minority and 20% majority if the plaintiffs prevailed and 40% minority and 60% majority if the defendants won.[136] The case was thus reduced to the question of which provision—nondiscrimination or antisegregation—should prevail when the two conflicted.

The Second Circuit reversed the summary judgment, ascribing to the NYCHA a clear duty under the fourteenth amendment and Title VIII "[to] act affirmatively to achieve integration in housing."[137] This duty remained "even though the effect in some instances might be to prevent some members of a racial minority from residing in publicly assisted housing in a particular location."[138] It was permissible, the court held, "[to] limit the number of apartments . . . available to persons of white or non-white races . . . where [the NYCHA] can show that such action is essential to promote a racially balanced community . . . ."[139] This was so because Title VIII was intended to assure "that

130. 484 F.2d 1122 (2d Cir. 1973).
131. *Id.* at 1125.
132. *Id.* at 1128.
133. *Id.*
134. *Id.*
135. 354 F. Supp. 941 (S.D.N.Y. 1973).
136. *Otero*, 484 F.2d 1122, 1132 (2d Cir. 1973).
137. *Id.* at 1133.
138. *Id.* at 1134.
139. *Id.* at 1140; *cf.* Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (2d Cir. 1984) (holding that a school board's goal of maintaining racial integra-

members of minority races would not be condemned to remain in urban ghettos in dense concentrations where employment and education opportunities were minimal."[140]

The court recognized that allowing the plaintiffs to prevail would grant them an immediate benefit, but thwart the larger goal of the Act by furthering the "trend toward ghettoization of our urban centers."[141] With this clear holding that discrimination was permissible to promote integration, the Second Circuit remanded the case for an evidentiary hearing on the effects which an 80% minority population would have on the area.[142]

VI. THE *Starrett City* CASE

In between its decisions in *Yonkers*[143] and *Huntington*[144]—which combine to squarely prohibit housing decisions having intended or inadvertent segregative effects—the Second Circuit decided *United States v. Starrett City Associates.*[145]

Starrett City is located twelve miles from Manhattan in the borough of Brooklyn. It was completed in 1973, and is built on the site of an abandoned landfill. It is bordered by a large junkyard, a garbage dump, a pollution control plant, and East New York, a predominantly black area plagued by crime, poverty, and drug abuse.[146] An unbridged waterway separates Starrett City from Canarsie, a largely white area to the west.[147]

The development came into existence through the planning and financial assistance of New York City,[148] New York State,[149] and the

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tion survived strict equal protection scrutiny as a matter of law, despite the burdens imposed on some minority students to prevent tipping).

140. 484 F.2d at 1133.

141. *Id.* at 1134.

142. *Id.* at 1135-37.

143. *See supra* notes 82-104 and accompanying text.

144. *See supra* notes 105-25 and accompanying text.

145. 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

146. Appellant's Brief at 7-10, United States v. Starrett City Assoc., 840 F.2d 1096 (2d Cir.) (No. 87-6132), *cert. denied*, 109 S. Ct. 376 (1988).

147. *Id.* at 9.

148. The site on which Starrett City stands was originally approved for the construction of a cooperatively owned housing complex by the United Housing Foundation, owner of Co-Op City in the Bronx. New York City granted generous real estate tax abatements to United, but the construction plan was abandoned due to United's inability to obtain adequate financing. Starrett took over the site contingent upon receiving the tax abatements for its own construction plan. The transfer was approved by the New York City Board of Estimate. 840 F.2d at 1103-04 (Newman, J., dissenting).

149. The New York State Housing Finance Agency (HFA) extended Starrett $362,720,000 in mortgage loans. *Id.* at 1098.

federal government.[150] Although the federal government's interest was mainly to provide affordable, rent-controlled housing for persons of low income,[151] New York City granted Starrett Housing Corporation (Starrett) tax abatements on assurances that Starrett would be a racially integrated community.[152] The shared concern of the city and state for preventing further racial segregation in Brooklyn[153] was echoed by area residents, who feared that construction of low income rental housing would result in the creation of "an overwhelmingly minority development."[154] This contention was based on familiarity with "the neighborhood surrounding the project and past experience with subsidized housing."[155] This point was well taken, as several projects near Starrett City have tipped from initial racial balance to almost complete segregation by renting units without using an integration maintenance mechanism.[156]

To combat enlargement of the already segregated area and to gain approval from the Board of Estimate, Starrett devised a quota system in accordance with the integration goals recommended by the New York State Division of Housing and Community Renewal (DHCR).[157] The minority quota was raised once, but otherwise has remained stable.[158]

In 1984, the federal government sued Starrett,[159] claiming that it

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150. HUD subsidizes Starrett's mortgage interest payments, and has paid the New York State HFA over $211 million on Starrett's behalf. *Id.* at 1104 (Newman, J., dissenting).

151. In addition to subsidizing Starrett's mortgage interest, for which Starrett agreed to limit rental fees to either a figure set by HUD or a stated fraction of the tenant's monthly income, HUD furnishes rental subsidies for tenants with very low incomes. *Id.* at 1104-05 (Newman, J., dissenting).

152. *Id.* at 1098.

153. *Id.* at 1104 (Newman, J., dissenting) (noting that the New York City Board of Estimate granted tax abatements and approved construction of Starrett City on the assurance of the New York State DHCR that it would be maintained as an integrated community).

154. United States v. Starrett City Assocs., 660 F. Supp. 668, 670 (E.D.N.Y. 1987). *But see* Otero v. New York City Hous. Auth., 484 F.2d 1122 (discussed *supra* notes 130-42 and accompanying text) (where the New York City Housing Authority was allowed to maintain racial integration by deliberately denying housing to minority applicants).

155. *Starrett City*, 660 F. Supp. at 670.

156. Appellant's Brief at 12, *Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132) (citing Rosenberg Aff. ¶ 94; JA 00393; and O. Newman, a housing expert, Aff. ¶¶ 36-39; JA 00815-818). The segregated projects near Starrett City are Rochdale Village, Lefrak City, Fairfield Towers, and Pink Houses. *Id.*

157. *Starrett City*, 840 F.2d at 1104 (Newman, J., dissenting). The New York State DHCR recommended tenant integration targets of 70% majority and 30% minority. *Id.*

158. *See infra* note 159.

159. *Starrett City*, 660 F. Supp. at 668. The government's commencement of the action was somewhat curious, as it observed with interest the negotiation and settlement of a class action suit filed against Starrett in 1979. In Arthur v. Starrett City Assocs., 98

was excluding prospective tenants in violation of the Act through the use of its quota system.[160] The government pointed out that Starrett was temporarily denying apartments to applicants solely on the basis of race and that black applicants generally waited significantly longer for apartments than whites.[161]

The allegation that Starrett's rental system was race-conscious and disproportionately burdensome to minority applicants was true and was uncontested by the owners of Starrett.[162] That this system violated the Act, however, was neither uncontested nor particularly clear. Starrett was indisputably motivated by the benign goal of integration maintenance[163] and was successfully deterring *de facto* segregation.[164] The disproportionate burden on black applicants occurs because more

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F.R.D. 500 (E.D.N.Y. 1979), a group of minority applicants challenged Starrett's quota system on both Title VIII and constitutional grounds. After protracted negotiations, the parties stipulated to a settlement under which Starrett agreed to raise its minority apartment quota three percent over five years. Arthur v. Starrett City Assocs., No. 79-3096 (E.D.N.Y. April 2, 1985). Starrett's co-defendant in the litigation, the New York State DHCR, agreed to actively promote housing opportunities for minorities in New York State supervised housing. Aside from the favorable settlement received by the *Arthur* plaintiffs, the consent decree left unresolved the issue of the legality of Starrett's tenant selection procedures, and the federal government filed its own action one month after the *Arthur* consent decree was entered. *See* United States v. Starrett City Assocs., 605 F. Supp. 262 (E.D.N.Y. 1985).

160. At the time suit was filed, the quotas provided for approximately 64% majority occupancy and 36% minority occupancy by rental unit. 660 F. Supp. at 671. *See supra* notes 2-4 and accompanying text.

161. Because fewer apartments are allotted to minority tenants and minority demand exceeds majority demand for units, blacks wait approximately ten times longer for two-bedroom apartments than do whites, and nearly three times longer for one-bedroom units. When the quota is reached for either majority or minority tenants, further applicants are placed on a waiting list, resulting in a temporary deprivation of housing. 840 F.2d at 1104 (Newman, J., dissenting).

162. Appellant's Brief at 13, *Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132) (citing Stipulation of Settlement and Consent Decree ¶¶ 28-29; JA 01311-1312).

163. Starrett City is a privately owned housing development. This fact was enough to convince the district court that Starrett was not a state actor obliged to carry forth the duties of the Fair Housing Act. The court determined that Starrett's obligation was "simply and solely to comply with the Fair Housing Act." 660 F. Supp. at 678. The degree of government involvement on a local, state, and federal level, however, *see supra* notes 148-53, makes this a dubious conclusion. The Second Circuit found it unnecessary to reach the issue of whether Starrett was in fact a state actor and thus bound to further the purposes of the Fair Housing Act, but indicated that this question would have been answered in the affirmative. The court stated that "[e]ven if Starrett were a state actor with . . . a duty [to integrate], the racial quotas and related practices employed at Starrett City to maintain integration violate the antidiscrimination provisions of the Act." 840 F.2d 1096, 1101 (2d Cir. 1988).

In any event, *Starrett City* remains useful for purposes of this Note regardless of its status as a state or private actor.

164. This conclusion is inferred from the fact that 80% of those awaiting admission to Starrett City are minority. *See supra* note 9; *see also Starrett City*, 840 F.2d at 1099.

black people than white apply for placement. Summary judgment, however, was granted for the government, and Starrett was commanded to align its rental practices with the letter of the Act[165] by treating blacks and other applicants on the same basis as whites.[166]

On appeal, Starrett raised similar issues to those ruled on by the district court, and the Second Circuit affirmed.[167] The court looked to the legislative history of the Act[168] and concluded that it was enacted to fulfill two goals: the elimination of racially discriminatory housing practices and the furtherance of racial integration in housing.[169] In practice, the court stated, the policy of nondiscrimination was actually meant to create racially integrated housing.[170]

Judge Miner, who authored the opinion, found several aspects of Starrett City's rental system objectionable. To begin with, the plan was not designed to be of brief duration.[171] It has been in place since 1973, and must continue, according to Starrett City's management, for at least fifteen more years.[172] The court also assumed that Starrett's justification for the plan was general societal discrimination,[173] referring at

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165. *See supra* note 5.

166. 660 F. Supp. at 679.

167. 840 F.2d at 1096.

168. *Id.* at 1101.

169. Judge Miner noted that both the fourteenth and thirteenth amendments empower Congress to legislate for the purpose of eliminating racial discrimination. Title VIII was enacted pursuant to the thirteenth amendment and thus, he concluded, must be "informed by the congressional goal of eradicating racial discrimination through the principle of antidiscrimination." 840 F.2d. at 1101.

170. Judge Miner wrote that statements from the floor of Congress "reveal 'that at the time that Title VIII was enacted, Congress believed that strict adherence to the antidiscrimination provisions of the [A]ct' would eliminate 'racially discriminatory housing practices [and] ultimately would result in residential integration.'" 840 F.2d at 1101 (quoting Burney v. Housing Auth. of County of Beaver, 551 F. Supp. 746, 769 (W.D. Pa. 1982)).

171. *Id.* at 1102. The court cited Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (plans making racial distinctions must be temporary and have defined goals as their termination point); United Steelworkers v. Weber, 443 U.S. 193 (1979) (race-conscious plans may not be "ageless in [their] reach into the past, and timeless in [their] ability to affect the future"); and Jaimes v. Lucas Metropolitan Hous. Auth., 833 F.2d 1203 (6th Cir. 1987) (a housing integration plan should end upon a finding that its goal has been achieved). *Id.* at 1101.

The court skirted the *Otero* precedent on this point, distinguishing "single event" deprivation from the indefinite quota system of *Starrett City*. Judge Newman later took Judge Miner to task on his selective willingness to disregard the language of Title VIII. He stated: "If, as the Court holds, Title VIII bars Starrett City's race-conscious rental policy, even though adopted to promote and maintain integration, then it would bar such policies whether adopted on a short-term or a long-term basis." *Id.* at 1107 (Newman, J., dissenting).

172. *Id.* at 1102. The owners of Starrett City offered no explanation for this estimate.

173. *Id.* at 1101-02 (citing *Wygant*, 476 U.S. 267 (1986) for its rejection of the proposition that societal discrimination alone may justify a plan employing racial distinc-

one point to Starrett's failure to allege past discrimination against *whites* within the complex.[174] Finally, the court found fault with Starrett's singular goal of integration maintenance, accomplished through strict limits on minority access to apartments.[175] Starrett City was thus ordered to cease renting under its quota system.

The impact of this decision is difficult to overstate. Starrett City has thrived for over fifteen years as a harmonious, racially integrated community. Oscar Newman, a renowned expert in the field of public housing, studied Starrett City and eight projects near it—each of which tipped in the 1970s[176]—for, *inter alia,* criminal activity and the scholastic performance of their youngsters. The results are startling. Starrett City's rates for murder, rape, assault, and burglary—among other crimes—were appreciably lower than those of all eight of the other projects. Four of these projects even housed tenants of higher average income than does Starrett.[177] Starrett City is "virtually drug free" and its walls are free of graffiti.[178]

The contrast between school performance statistics for Public School (P.S.) 346—located in Starrett City—and those for P.S. 306—located less than one-half mile away in East New York—is even more striking. Students at these schools are from comparable socio-economic environments, but P.S. 346 reflects the racial integration of Starrett's rental quotas,[179] while P.S. 306 is over 80% black.[180] For the

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tions which adversely affect innocent people).

174. Judge Miner seems, with this suggestion, to indicate a belief that whites are the benefitted class under the Starrett City integration plan. This Note argues the opposite—that the plan serves mainly to benefit minorities, who stand to gain more from racial integration in housing than do whites, because

> [t]he biased community can more easily discriminate against Negroes who are all concentrated in one area. At least until very recently, Negro areas traditionally received far less adequate governmental services—maintenance, police protection, etc.—than did the rest of the city. Integration thus protects the Negro by surrounding him with a shield of whites whom the community, presumably, is less willing to short-change.

Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U.L. REV. 363, 389 (1966) (citation omitted).

175. 840 F.2d at 1102 (citing Burney v. Housing Auth. of Beaver, 551 F. Supp. 746 (W.D. Pa. 1982) (integration plans maintained by limiting minority participation of questionable validity); Jaimes v. Lucas Metropolitan Hous. Auth., 833 F.2d 1203 (6th Cir. 1987)).

176. Memorandum as Amicus Curiae by Starrett City Tenants Assocs., Submitted in Support of Appellants' Petition for Rehearing at 9-16, *Starrett City,* 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132). Four of the projects studied were in East New York, two were in Queens, and two were within one mile of Starrett City in Brooklyn. *Id.*

177. *Id.* at 11-12 (citing Newman Aff. at 69-73).

178. Memorandum as Amicus Curiae by Concerned Public Officials and Civil Rights, Housing and Community Organizations Submitted in Support of Appellants' Petition for Rehearing at 3, *Starrett City,* 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132).

179. Public school (P.S.) 346 has a racial composition of approximately 27% black,

1985 school year, 70% of P.S. 346's students were reading at or above their grade level. The figure for P.S. 306 students was 52.5%. In math, 71% of P.S. 346's students performed at or above grade level, compared to 61% at P.S. 306.[181] Newman also compared elementary and intermediate schools within Starrett City to schools serving three other local housing projects. In each instance, students at the schools within Starrett obtained scores "far ahead" of students at the other schools.[182]

VII. THE GOAL(S)? OF THE FAIR HOUSING ACT

Without the use of a quota system to maintain racial integration, Starrett City will become racially segregated. Its location,[183] the level of black demand for local housing,[184] and the tipping phenomenon assure this. Judge Miner did not dispute it. The question remains, however, after nearly twenty years of Title VIII decisions clearly aimed at promoting integration, what justified a ruling which all but sounded the death knell for a successful, integrated community?

Judge Newman conceded, in his dissent, that Starrett's quota system violated the letter of the Act,[185] but argued that the court's result was not required by it.[186] The debate between Judge Newman and his brethren centered on the goals that each side identifies as those of the Act. The court maintained that Congress intended to outlaw all discrimination, in the belief that colorblind housing practices would lead naturally to racial integration.[187] Thus, it identified nondiscrimination and racial integration as "the dual goals of the Act."[188] Judge Newman claimed that the single goal of Congress in passing the Act was to end segregation, and that a literal reading of its antidiscrimination lan-

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22% Hispanic, 40% white, and 11% other. Memorandum as Amicus Curiae by Starrett City Tenants Assoc. at 13, *Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132).

180. *Id.* at 13 (citing Newman Aff. at 76).

181. *Id.* at 13 (citing Newman Aff. at 76-79).

182. *Id.* at 13 (citing Newman Aff. at 76).

183. *See supra* note 146 and accompanying text.

184. *See supra* note 164 and accompanying text.

185. United States v. Starrett City Assocs., 840 F.2d 1096, 1105 (2d Cir. 1988); *see supra* note 5.

186. 840 F.2d at 1107 (Newman, J., dissenting).

187. *Id.* at 1101. The characterization of Title VIII's antidiscrimination provisions as the means by which its antisegregation goal would be achieved is not novel. *See supra* notes 169-70 and accompanying text; *see also* Note, *Tipping the Scales of Justice*, *supra* note 17, at 384 ("[h]istory shows that at the time Title VIII was enacted, it was believed that strict adherence to the policy embodied in its antidiscrimination provisions could only promote this policy of antisegregation.") (citing Rubinowitz & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 NW. U.L. REV. 491, 533-65 (1979)).

188. 840 F.2d at 1101.

guage led the court to a perverse, unnecessary result.[189] There is ample support for Judge Newman's interpretation of congressional intent.[190]

A close reading of these arguments reveals that Judge Newman's view is better reasoned. Judge Miner stated that "Congress saw the antidiscrimination policy as the *means* to effect the antisegregation-integration policy."[191] But the conclusion Judge Miner drew from this statement is something of a non sequitur. Nondiscrimination, as described by Judge Miner, is one "goal" of Title VIII which was to lead to another "goal" (racial integration).[192] His own words, however, refer to nondiscrimination and racial integration in terms of a means-end relationship, clearly indicating a *single* goal. The court's suspect reasoning on this point was critical; by labeling antidiscrimination and antisegregation as the "dual goals"[193] of Title VIII (thus assigning them equal weight), it was unable to conclude—as the *Otero* court had—that the antidiscrimination ideal should be sacrificed when necessary to promote integration. By upholding Starrett's quota system, Judge Miner would have been allowing discrimination in order to maintain integration and its proven attendant benefits.[194] By dismantling the discriminatory quota, he has paved the way for white flight and segregation. Had he identified nondiscrimination as simply the ideal means by which Title VIII's single goal of racial integration should be achieved, Judge Miner might have chosen the former scenario rather than the latter, which surrenders a successful integration scheme to the forces of tipping.

VIII. TIPPING AND THE NONDISCRIMINATION VS. ANTISEGREGATION CONFLICT

Neighborhood tipping results from the exercise of racial discrimination. Whites departing from a house or building are being openly discriminatory in their choice of neighbors, though not in an illegal sense.[195] Rather than reside in an integrated building or risk devalua-

189. *Id.* at 1106 ("Title VIII bars discriminatory housing practices in order to end segregated housing").

190. *See supra* notes 17-23 and accompanying text; *see also* Note, *Tipping the Scales of Justice*, *supra* note 17, at 384 ("[a] primary congressional intention in passing [Title VIII] was to break up residential concentrations of minorities and to foster integrated living patterns."); Dubofsky, *Fair Housing, A Legislative History And A Perspective*, 8 WASHBURN L.J. 149, 153-54 (1969) (through the Fair Housing Act, Congress sought to free blacks from the ghettos, to attain better schooling, housing, and employment).

191. 840 F.2d at 1101 (emphasis added).

192. *Id.*

193. *Id.*

194. *See supra* notes 176-82 and accompanying text.

195. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1983) (discrimination defined as a prejudicial outlook or action, with no denotation of illegality).

tion of their homes, they choose to flee. Persons deciding not to enter a neighborhood or development because of its racial composition are similarly discriminating, albeit more covertly. In neither case though, is there illegal action by the prejudiced person(s).

This fact—that some racial discrimination is impervious to the law—illustrates Title VIII's deficiency. The nondiscrimination provision of the Act is not broad enough to prevent the private discrimination that leads to tipping. Title VIII is able "to ensure that no one is denied the right to live *where* they [sic] choose for discriminatory reasons,"[196] but it is unable to grant us the right to live *with whom* we choose. Congress was wrong to think that Title VIII's nondiscrimination provisions would inevitably lead to racial integration; the discrimination which manifests itself in a racially transitional neighborhood violates neither the Constitution nor Title VIII. As evidenced by the projects near Starrett City that have recently tipped, such discrimination is commonplace.[197]

With this fact in mind it is useful to consider the argument that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[198] This notion has been expressed where majority group members have: (1) threatened violence if housing integration was forced upon them;[199] (2) legislatively opposed equally weighted votes for minorities;[200] and (3) objected to the prospect of integrated schools.[201] Before it is accepted in the tipping context, however, a pragmatic concern must be addressed. White flight and the segregation it creates is legal, and occurs even without the "force of law" behind it. The ability of people to give *segregative effect*

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196. Southend Neighborhood Improvement Assoc. v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) (emphasis supplied).

197. *See supra* note 176 and accompanying text.

198. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that a judge cannot deny custody of a child to an interracial couple because of private biases and the injuries such biases might cause).

199. *See, e.g.*, United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1226 (2d Cir. 1987) ("[c]ity may properly be held liable for the segregative effects of a decision to cater to this 'will of the people.' "); Gautreaux v. Chicago Hous. Auth., 436 F.2d 306, 307-08, 313 (7th Cir. 1970) (community opposition to subsidized housing proposed for white area did not justify city's delay in proceeding with building plans), *cert. denied*, 402 U.S. 922 (1971); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1019 (E.D. Pa. 1976) ("[t]hreatened violence on the part of the citizens . . . does not excuse the denial of civil rights."), *modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

200. Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (skewed apportionment plan held invalid, though approved by a majority of the state's electorate). The Court declared that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." *Id.* at 736-37.

201. Hoots v. Pennsylvania, 672 F.2d 1107, 1115 (3d Cir.), *cert. denied sub nom.* Edgewood School Dist. v. Hoots, 459 U.S. 824 (1982) (school authorities may not maintain segregated schools to indulge the wishes of the majority).

to their biases differentiates the tipping phenomenon from other displays of private bias. If private prejudice is not recognized and accommodated to some extent, both the discrimination (white flight) *and* segregation will result. Race-conscious integration mechanisms—while unquestionably discriminatory themselves—at least effectively promote integration and achieve the goal of Title VIII.

Tipping situations must be distinguished from situations where private biases harm minorities through illegal means, such as job discrimination, unfair apportionment, or violence. A refusal to "give effect" to private biases in a tipping situation, (through a quota system, for example), encourages biased persons to flee because they cannot be punished for so doing. Racial segregation results without legal liability for those who caused it. Conversely, employers or labor unions which refuse to hire or promote minority workers are subject to legal sanctions,[202] as are violent demonstrators in any context. By refusing to accede to private prejudice where violence or employment discrimination is threatened, no "invitation" to discriminate is extended, as the specter of prosecution or civil liability serves as a deterrent. Expanding the use of integration mechanisms to accommodate private biases in the housing context would therefore not necessitate extending it to situations where segregative effect can in no manner be achieved without the "force of law."

The Act's inability to prevent tipping creates a clear legal conflict in the subsidized housing context. Title VIII case law makes perfectly clear that by creating or allowing segregated housing, a housing authority is illegally discriminating.[203] To maintain racial integration against a tipping force, however, minorities must be denied unbridled access to housing—in simple terms, discriminated against—so as to keep their population below the point at which white flight will occur. In a situation where tipping is imminent, racial discrimination is inevitable. In form, it will be either affirmative, race-conscious action to prevent segregation (as in *Otero*),[204] or a simple abdication of the duty to prevent segregation (Starrett City without its quota).[205]

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202. In employment discrimination cases, the remedy of a colorblind hiring scheme serves to remove the obstacles to integration in the work force, at least to the degree that underrepresentation of minorities has been caused by employer discrimination. Employers are simply forbidden by law to give segregative effect to their personal biases by excluding minority applicants. The analog to white flight—closing up shop rather than endure an integrated work force—is legal, but functionally impossible for economic reasons. *See generally* Note, *Tipping the Scales of Justice*, *supra* note 17, at 390 n.45 (describing differences between Title VII and Title VIII cases).

203. *See supra* notes 31-142 and accompanying text.

204. 484 F.2d 1122 (2d Cir. 1973). For a discussion of *Otero*, see *supra* notes 130-42 and accompanying text.

205. 840 F.2d 1096 (2d Cir. 1988). For a discussion of *Starrett City*, see *supra* notes

Starrett City responded to the "conflict" by using a strict, indefinite racial quota to maintain integration. For practical reasons alone, the quota should have been upheld. Every case examined above stands—in the name of Title VIII—for the ideal of racial integration in public housing and the benefits that it brings. The cases represent a twenty year commitment to ruling in favor of desegregated housing, and have come from virtually every circuit in the nation. The Second Circuit itself has repeatedly recognized the compelling importance of integration[206] and, in *Otero*, forcefully resolved the conflict between antidiscrimination and antisegregation in favor of the latter. By ruling as it did, the *Starrett City* court knowingly forfeited tangible, quantifiable benefits for nearly 20,000 people of assorted races so that one more segregated project was "free" to be formed.

IX. Balancing Interests When Discrimination is Necessary for Integration

To properly determine whether its literal reading of the Act was prudent, the *Starrett City* court should have used a balancing test to evaluate the competing considerations. The Act literally forbids *all* discrimination in housing. But as pointed out by the *Starrett City* dissent,[207] it cannot seriously be argued that an integration plan is illegal under the Act simply because it is discriminatory. This is because the Act admits no exceptions. *Every* benign discriminatory measure which courts have allowed violates the Act to the same degree—that is, completely. "Legal" discrimination such as that allowed in *Otero* is merely a measure of how far the letter of the Act[208] has been compromised by the judges construing it.

The *Black Jack*[209] Title VIII test is desirable for its flexibility and provides ample guidance in evaluating the disproportionate adverse effects incident to integration plans.[210] Analyzing the *Starrett City* plan under this well known Title VIII test makes clear that this case was—at the very least—much closer than the majority opinion suggests. Under the *Black Jack* test, a court must consider:

> [F]irst, whether the [integration maintenance mechanism] in fact further[ed] the governmental interest asserted; second, whether the public interest served by the [mechanism] is con-

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143-82 and accompanying text.

206. *See supra* notes 82-142 and accompanying text.

207. 840 F.2d at 1103-08 (Newman, J., dissenting).

208. *See supra* note 5.

209. *See supra* notes 49-55.

210. *See generally* Note, *supra* note 14 (recommending a "general" test such as that put forth in *Black Jack* for balancing interests in Title VIII cases).

> stitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained.[211]

Without doubt, Starrett City's rigid quota satisfied the first factor by successfully maintaining racial integration.

The first tier of the second factor also can be disposed of easily. The public interest served by the quota was permissible, for it is well established that race-conscious integration plans may be constitutionally valid.[212] Title VIII itself provides abundant proof of constitutional validity; "[t]he legislative history of the Act reveals, that in enacting this legislation, Congress was attempting to remedy its past failures in ending racial discrimination in housing by espousing the concept of affirmative action."[213] Although Starrett City is privately owned, the degree to which it is subsidized[214] indicates that it is a state actor, bound to carry forth the goal of the Act.

The balancing test of the second factor—or one like it—should have been applied by the court. While it is true that applicants were being denied housing in Starrett City on account of their race, the high level of black demand for admission was undoubtedly fueled by the desire to live in an integrated development. Thus the main incentive for seeking admission to Starrett City will be erased as, over a short time, Starrett tips. The short term benefit secured for these applicants cannot outweigh the manifold benefits Starrett was providing and would have continued to provide for persons of all races.[215]

Finally, given the sustained tipping threat at Starrett City, the quota system was almost certainly the least drastic way to maintain integration there. The quotas served not to absolutely deny housing,

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211. 508 F.2d at 1186-87 (citation omitted). Although the *Black Jack* court referred to this test as an equal protection standard, it was, in fact, taken from Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972), an employment discrimination case brought under Title VII of the Civil Rights Act of 1964.

212. *See* United States v. Starrett City Assocs., 840 F.2d 1096, 1101 (2d Cir. 1988) (citing United States v. Paradise, 480 U.S. 149 (1987) (district court order requiring that 50% of promotions within a predominantly white police force go to black officers permissible under the fourteenth amendment)); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (preferential layoff scheme not sufficiently tailored for equal protection purposes to accomplish otherwise legitimate purpose of remedying minority under-representation in school system); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) ("[p]reference[s] based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that [they do] not conflict with constitutional guarantees."); United Steelworkers v. Weber, 443 U.S. 193 (1979) (affirmative action plan to eliminate racial imbalance in a traditionally segregated craft allowable under Title VII).

213. Schmidt v. Boston Hous. Auth., 505 F. Supp. 988, 994 (D. Mass. 1981).

214. *See supra* notes 148-63 and accompanying text.

215. *See supra* text accompanying notes 176-82.

but only to delay admission for those whose race had filled its quota. The figures were set at a level believed to be immediately below the tipping point, ensuring that no more blacks than necessary were being made to wait for entrance. Further, a nearly *perfectly* tailored minority quota could be established by slowly raising the figure until tipping began and then lowering it just enough to equalize white demand with white departure. If there was a less restrictive way than a quota system to actually *prevent*[216] Starrett City from tipping, the author did not come across it. It has already been noted that white flight may not simply be made illegal.

Because of the scarcity of integrated, subsidized housing in New York, Starrett City generated enormous demand for admission. To prevent courts and housing authorities from having to choose between segregation and integration maintained through discrimination, a move toward integration on a wide scale is required. This proposition is not as circular as it sounds. If there were many integrated projects from which to select, black applicants would not comprise an inordinately large part of the waiting list at any one development, and the threat of white flight would not develop.[217] But the tipping phenomenon can be defeated *before* widespread integration is accomplished if all projects hold the promise of moving toward racial integration and are attractive to applicants for this reason.

X. CITYWIDE RACE-CONSCIOUS TENANT SELECTION: A BLUEPRINT FOR INTEGRATED HOUSING

Since 1981, the housing authorities of at least three cities have developed race-conscious plans for citywide integration.[218] The provisions recommended here are drawn, in part, from each of these three plans, and are meant only to suggest a framework within which a city may

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216. In Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968), the Supreme Court called for a public school integration plan "that promise[d] realistically to work, and promise[d] realistically to work *now*." *Id.* at 439 (emphasis in original). No less should be required of Public Housing Authorities.

217. In 1984, the New York State's Division of Housing and Community Renewal identified 18 public projects in New York City with over 80% majority occupancy. Memorandum as Amicus Curiae by Starrett City Tenants Assocs., Submitted in Support of Appellants' Petition for Rehearing at 9-16, *Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (No. 87-6132).

218. Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203 (6th Cir. 1987) (upheld in part as facially neutral and properly remedial, invalid to the extent that integration ratio operated to prefer one race or another in obtaining public housing); Burney v. Housing Auth. of Beaver, 551 F. Supp. 746 (W.D. Pa. 1982) (invalid under equal protection clause for being neither necessary nor narrowly tailored); Schmidt v. Boston Hous. Auth., 505 F. Supp. 988 (D. Mass. 1981) (valid under equal protection clause in the absence of discriminatory intent and under Title VIII for producing no discriminatory effect).

tailor a plan to suit its particular situation. A carefully crafted plan should pass constitutional muster and survive any of the Title VIII tests encountered above, even if it makes use of numerical ratios and targets.[219]

A housing authority should initially determine what percentage of the total pool of people residing in its buildings and waiting for admission are white, and what percentage are black.[220] These percentages would represent the target racial compositions for each building, and—while not serving as strict quotas—would function as standards by which to measure progress and to determine when the plan may be terminated. As suggested by the Sixth Circuit in *Jaimes*, a citywide annual review would be appropriate to update the target percentages and determine "which projects were ripe for further integrative transfers."[221]

The central feature of a race-conscious housing plan should be the system of priorities it establishes. In a broad sense, persons willing to help improve the racial balance of a city's public housing system should be given certain considerations over those who refuse to help. In other words, at predominantly white projects, blacks would be accorded preferred admission and transfer status. At predominantly black projects, whites would receive such favorable treatment. In the words of the Sixth Circuit, such "plan[s] . . . [do] not involve so-called reverse discrimination," but are "facially neutral . . . neither prefer[ring] blacks over whites nor whites over blacks."[222] Rather, such plans prefer "those tenants and would-be tenants . . . who are willing to aid in the integration of the public housing facilities."[223]

The class of persons entitled to priority treatment by an authority would thus contain two subclasses: integrative transferees and new applicants willing to be assigned to a project where their race was in the minority.[224] Integrative transferees would receive first priority (after emergency transferees) for units in projects where their race was in the

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219. *See supra* notes 49-125 and accompanying text. *See also* Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938, 948-49 (1980) ("Title VIII should be considered, as Title VI was in *Bakke*, coterminous with the fourteenth amendment in evaluating the validity of benign discrimination.").

220. Different races may be applicable in a particular city. "Black" and "white" should be understood as generic labels for minority and majority residents.

221. 833 F.2d at 1207.

222. *See id.* at 1207; *accord Schmidt*, 505 F. Supp. at 995.

223. *Id.* at 1207.

224. Although the determination of who is a "minority" for which project may be made in various ways, the *Burney* plan seems most helpful. Under this formula a project is racially imbalanced when it contains a higher percentage of either black or white families than exists in the city's public housing system as a whole. Burney v. Housing Auth. of Beaver, 551 F. Supp. 746, 750 (W.D. Pa. 1982).

minority *if* they were transferring from a location where their race predominated. Such transfers would create a substantial benefit by enhancing integration in two projects without reducing the number of units available for new applicants. In recognition of these benefits, the *Jaimes* plan called for Housing Authority and HUD funds to subsidize the cost of moving, the first month's rent, and counseling for integrative transferees.[225]

Apart from integrative transfers, a housing authority could maintain a single list of applicants in chronological order. As an applicant's name came up, she would be offered the first available unit in which her race was in the minority. An applicant would be free to choose among such units if several were available. Upon an objective showing of good cause, an applicant could reject one or more units without forfeiting her position on line.[226] The refused unit would be passed down to the next applicant of the same race. Failure to show good cause for rejecting an integrative placement would result in an applicant's removal to the bottom of the list.[227]

To further safeguard against unduly burdening applicants, if after a reasonable time no suitable unit (in terms of size, location, etc.) became available at a project in which the applicant's race was in the minority, she could be offered one in a project where her race predominated. She could refuse such a unit *without* showing cause and retain her place in line. Presumably, many people are anxious to escape segregation and so would not choose to accept a unit at a project where their race was concentrated.[228]

Finally, each project that substantially attained its target percentages prior to termination of the plan could be maintained by replacing

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225. 833 F.2d at 1206.

226. The *Jaimes* plan specified physical needs, health hardship, and employment hardship as constituting good cause for refusing a unit. *Id.*

227. Placing applicants who refuse to accept integrative placements at the bottom of the waiting list would create only a temporary burden on them. As integration proceeded throughout the system, there would be greater racial parity between the projects. Thus, by the time an applicant worked her way through the waiting list a second time, she would stand a better chance of being offered a unit in a building where her race was only slightly in the minority (or even slightly in the majority).

228. This proposition seems counterintuitive at first blush because, after all, the fact that segregation exists must mean that people *prefer* that it does and so, would choose segregative placement if available. However, this Note proceeds on the generality that segregation exists largely because *whites* alone have created it and maintained it. As stated by one commentator: "[t]he biased community can more easily discriminate against Negroes who are all concentrated in one area." Kaplan, *supra* note 174, at 389. Thus, it seems likely that minorities, especially those who have lived in areas that have "traditionally received far less adequate governmental services—maintenance, police protection, etc.—than did the rest of the city," *id.* at 389, would generally choose to wait for an integrative placement.

departing families with families of the same race. A housing authority could end its plan upon determining that all of its projects were truly open to all races and that citywide integration was likely to continue and be self-sustaining.

XI. Equal Protection and the Plan

As noted above, it is well established that race-conscious integration plans may be constitutionally valid.[229] Further, it is permissible to have innocent people share the burdens created by a carefully tailored affirmative action plan.[230] Equally well settled, however, is the fact that such plans trigger strict equal protection scrutiny regardless of their benign nature or the race of those burdened or benefitted by a particular classification.[231] Under strict scrutiny, a plan which "contains 'suspect classifications' . . . can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."[232] But if application of this standard amounts to "more than an idle invocation of a slogan,"[233] a narrowly tailored citywide integration plan should pass muster under current law, including the Supreme Court's latest affirmative action decision, *City of Richmond v. J.A. Croson Co.*[234]

The language of Title VIII and statements made by its sponsors are clear proof that the government has a strong interest in racially integrated housing.[235] A federal regulation that makes racial concentration a mandatory consideration for new construction proposals is further evidence of the same.[236] Scholarly authority suggests that "no one

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229. *See supra* note 219 and accompanying text.

230. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986) (plurality opinion) (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)).

231. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989) (citing *Wygant*, 476 U.S. 267, 279-80 (1986)); *see, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291-99 (1978) (opinion of Powell, J., joined by White, J.); *see also* Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. Cal. L. Rev. 947, 982 (1985) ("[t]here seems no room for doubt that strict scrutiny is the proper test to be applied to integration maintenance.").

232. *Bakke*, 438 U.S. at 357.

233. Burney v. Housing Auth. of Beaver, 551 F. Supp. 746, 756 (W.D. Pa. 1982).

234. 109 S. Ct. 706 (1989) (invalidating a plan under which prime contractors awarded city construction contracts were required to subcontract at minimum 30% of the dollar value of such contracts to one or more minority business enterprises).

235. *See* 42 U.S.C. §§ 3601-3631 (1982); *see also supra* note 5 and text accompanying notes 18-21.

236. 24 C.F.R. § 880.206 (1988) provides in pertinent part:

(c) The site [for new construction] must not be located in:

(1) An area of minority concentration . . . ; or

(2) A racially mixed area if the project will cause a significant increase in the

can say that the achievement and maintenance of integration are not compelling values in American society,"[237] and the crime and education statistics at Starrett City underscore the point.[238] Finally, the Supreme Court has, on several occasions, indicated its view that racial integration is of great importance to society.[239]

Compelling interest analysis does not cease after the importance of the interest is established, however. To justify the use of racial classifications to remedy discrimination, "the Court has insisted upon some showing of prior discrimination by the governmental unit involved."[240] As stated by Justice Powell in *Regents of University of California v. Bakke*, race-conscious plans cannot be used for "remedying . . . the effects of 'societal discrimination.' "[241] Rather, Justice Powell "indicated that for the governmental interest in remedying past discrimination to be triggered 'judicial, legislative, or administrative findings of constitutional or *statutory violations*' must be made."[242]

The compelling interest tier of the strict scrutiny test should be satisfied wherever a housing authority could show that it intentionally created a segregated system (through discriminatory site selection or exclusionary zoning) or knowingly maintained a segregated system in furtherance of its Title VIII "obligation to act affirmatively to achieve integration in housing."[243] In light of all the Title VIII cases requiring cities to combat segregation, a segregated public housing system stands as a stark and telltale sign of past (and probably continuing) racial discrimination, and is precisely "the type of identified discrimination that can support and define the scope of race-based relief."[244] A housing authority's own records would provide "guidance for a legislative body to determine the precise scope of the injury it seeks to remedy"[245]

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proportion of minority to non-minority residents in the area.

237. Smolla, *supra* note 230, at 983.

238. *See supra* notes 176-82 and accompanying text.

239. *See, e.g.*, Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977) ("[s]ubstantial benefits flow to both whites and blacks from interracial association . . . ."); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . 'the whole community' . . . .").

240. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion).

241. 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (emphasis added).

242. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 723 (1989) (emphasis supplied) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

243. Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973). For a discussion of *Otero*, see *supra* notes 130-42 and accompanying text.

244. *City of Richmond*, 109 S. Ct. at 723.

245. *Id.* Justice O'Connor acknowledged that statistical disparities may, in the proper case, suffice to establish prima facie proof of a pattern of discrimination. In fact, she carefully distinguished situations where "special qualifications are required to fill particular jobs" and those "in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully ex-

and would signal after time that a "logical stopping point" had been reached.[246]

Aside from the compelling interest inquiry, it has been suggested that the most important role for courts in evaluating racial classifications is the "examination of the 'tightness of fit' between ends and means [which] is closer to the traditional institutional role of a court than is the more heavily policy-laden decision as to whether particular goals are compelling."[247] The inquiry to determine closeness of fit requires consideration of whether lawful alternative and less restrictive means could have been used.[248]

Of the three aforementioned citywide plans,[249] the only one found not to be narrowly tailored carelessly burdened more minorities than necessary to achieve its goal, and failed to provide the burdened parties with alternative housing.[250] The burdens and deprivations that will cause a plan to be invalidated for lack of careful tailoring are by now familiar from numerous Supreme Court holdings and are easily avoided by careful drafting and implementation.

In *Wygant v. Jackson Board of Education*,[251] the Supreme Court held affirmative action plans that deprive innocent parties of only one of several opportunities to be less intrusive than plans that cause the loss of "settled expectations" for particular individuals.[252] Justice Powell distinguished preferential hiring schemes from preferential layoff plans on this basis, noting that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job."[253]

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cluded." *Id.* at 725 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977), and Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)).

Clearly the public housing context involves the latter situation, and where a project's percentage of a particular race is far below that race's percentage of eligible public housing residents in the city, prima facie proof of discriminatory exclusion is established.

246. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (plurality opinion).

247. Smolla, *supra* note 230, at 990; *see also* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 565 (1975) (citation omitted) ("while benign racial classifications call for some weighing of the importance of ends they call for even more intense scrutiny of means, especially of the administrability of less onerous alternative classifications").

248. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974).

249. *See supra* note 218 and accompanying text.

250. Burney v. Housing Auth. of Beaver, 551 F. Supp. 746 (W.D. Pa. 1982) (integration plan held violative of the equal protection clause because it restricted black entry into housing to a greater degree than was necessary to prevent tipping and failed to provide alternative housing to the excluded parties).

251. 476 U.S. 267 (1986).

252. *Id.* at 283-84.

253. *Id.* at 282-83.

Clearly the housing plan outlined above[254] more closely resembles a hiring scheme than a layoff plan. A race-conscious tenant assignment plan would, at times, foreclose applicants from living in specific locations (unless all other locations would cause undue hardship, etc.). Every applicant, however, would be provided with suitable housing.[255] Additionally, nobody residing in a building would be displaced or relocated involuntarily.

In *United States v. Paradise*,[256] the Court upheld a "flexible, waivable, and temporary"[257] race-conscious promotion plan that favored blacks without "impos[ing] an 'absolute bar' to white advancement."[258] Each of these attributes are shared by the proposed housing plan. The plan provides for emergency transfers without regard to race; it allows an applicant to be offered a unit in a project where he will not improve the racial balance if he has waited past a reasonable time; it provides for annual review to maintain accurate targets and establish a termination point; and it permits an applicant to choose among available buildings and refuse placement for good cause without being penalized.

Finally, although it is not technically related to careful tailoring, courts and commentators have expressed concern that racial classifications may operate to stigmatize a racial group.[259] But where no "special qualifications are required to fill particular jobs"[260] or earn admission to a school, the threat of stigma is virtually non-existent. The reasons that persons are excluded from housing are obviously unrelated to any abilities or disabilities they may have. Affirmative action to promote integrated housing does not seek to compensate for lack of merit in the excluded groups—it compensates solely for racial animus. Moreover, it bears noting that the proposed housing integration plan is facially neutral. Persons of either race may receive preferred consideration for ad-

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254. *See supra* notes 220-27 and accompanying text.

255. This aspect of the plan is responsive to one infirmity identified in *Burney* and *Bakke*. In *Bakke*, the Court decried the fact that "[p]etitioner did not arrange for [Bakke] to attend a different medical school in order to desegregate Davis Medical School; instead, it . . . may have deprived him altogether of a medical education." 438 U.S. at 300 n.39 (opinion of Powell, J.).

256. 480 U.S. 149 (1987).

257. *Id.* at 178.

258. *Id.* at 182 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 481 (1986)).

259. *See Bakke*, 438 U.S. at 357-58 (racial classifications are stigmatizing when "they are drawn on the presumption that one race is inferior to another" or when "they put the weight of government behind racial hatred and separatism."); Note, *Tipping the Scales of Justice*, *supra* note 17, at 389-90 (1982) (recommending that where public entities use racial classifications to benefit minorities, courts should examine whether individuals are thereby stigmatized on the basis of race).

260. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 725 (1989).

mission to a particular project.[261]

XII. CONCLUSION

The lesson of *Starrett City*—that people living in interracial association live better—should not be ignored. Starrett City was a shining example of why racial integration is the cherished goal of Title VIII, and its success suggests the best reason to separate the notion of discrimination from that of integration in the context of neighborhood tipping. Fortunately, a carefully tailored citywide plan could achieve on a broader scale what Starrett was accomplishing singlehandedly. A city's plan to integrate a segregated public housing system would emphatically underscore the "[Supreme] Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law' "[262] by helping to fulfill the promise embodied twenty-one years ago in The Fair Housing Act.

Dale J. Lois

261. Although this Note in no way seeks to disparage any other types of integration plans, it should be noted that where a large system of segregated housing already exists within a city, a plan of the type here recommended will be necessary. Alternatives such as "scatter-site" housing, *see generally* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), are unworkable in large cities with limited building space. Projects in such cities are inevitably large and, even if constructed in predominantly white areas, are capable of an independent, segregated racial character.

262. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (Brennan, J., concurring in part and dissenting in part)).