

# THE PRICE OF EQUALITY: FAIR HOUSING, LAND USE, AND DISPARATE IMPACT

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*Zoning may be good or bad, but the  
Fair Housing Act is not the charter of its abolition.*

— Richard A. Posner<sup>1</sup>

## INTRODUCTION

Well, *that* was a surprise.

Few expected that the Supreme Court would uphold disparate-impact liability under the Fair Housing Act (FHA),<sup>2</sup> but in *Texas Department. of Community Affairs v. Inclusive Communities Project*,<sup>3</sup> it did so. The decision has major implications in a variety of sectors, particularly in banking. Indeed, although the holding itself concerned affordable housing, the push to end Title VIII<sup>4</sup> disparate impact came most prominently from banks and other financial institutions, who did not relish the prospect of civil rights lawsuits against their lending practices.<sup>5</sup>

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1. Hemisphere Bldg. Co. v. Vill. of Richton Park, 171 F.3d 440 (7th Cir. 1999).

2. Fair Housing Act, 42 U.S.C. §§ 3601–19 (2012).

3. Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015).

4. The Fair Housing Act is often referred to as “Title VIII,” because the original law formed the eighth title of the Civil Rights Act of 1968 enacted April 11, 1968. Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73. In this Article, I will use the terms “Fair Housing Act” and “Title VIII” interchangeably.

5. See Greg Stohr & David McLaughlin, *Supreme Court Backs Housing Discrimination Lawsuits*, BLOOMBERG (June 25, 2015, 5:48 PM), <http://www.bloomberg.com/news/articles/2015-06-25/housing-discrimination-law-suits-backed-by-u-s-supreme-court> (describing the decision as “a blow to lenders and insurers”); Joe Adler, *Supreme Court Backs ‘Disparate Impact’ Theory in Texas Case*, AM. BANKER (June 25, 2015, 10:22 AM), <http://www.american>

As the Court explained, however, the “heartland”<sup>6</sup> of Title VIII disparate impact comes in the field of land use and urban planning. The most prominent Title VIII disparate-impact cases concern exclusionary zoning, where municipal<sup>7</sup> regulations make it difficult or expensive to build multifamily and/or affordable units.<sup>8</sup> *Inclusive Communities Project* will affect this area more than others.

Moreover, the case will impact land use more than a typical Supreme Court case would, given that the law in this area is underdeveloped. Although every circuit had accepted disparate impact theory for Title VIII,<sup>9</sup> the circuits had left critical parts of the theory unclear, making it more difficult to pursue litigation strategies. Scholars have not helped, either, believing not unreasonably that there was little point to developing a legal theory

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banker.com/news/law-regulation/supreme-court-backs-disparate-impact-theory-in-texas-case-1075083-1.html (describing the decision as “a huge win for housing advocates and a setback for the banking industry”). Even before the Court issued its decision, the American Bankers’ Association was pushing to excise disparate impact liability from the statute. *See ABA, Groups Welcome Amendment to Limit ‘Disparate Impact’*, A.B.A. BANKING J. (June 4, 2015), <http://bankingjournal.aba.com/2015/06/aba-groups-welcome-amendment-to-limit-disparate-impact> (last visited Aug. 2, 2016).

6. Tex. Dep’t. of Hous. & Cmty. Affairs v. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

7. This Article will use the term “municipal” or will refer to “cities” when discussing the government unit with authority over land use. In the United States, it is overwhelmingly the case that the city is the government with this authority. But it is not always the case. In unincorporated areas, counties usually hold land use authority. In regions with high environmental values, state environmental agencies will hold effective land use power, and sometimes other units of state government will hold this power. For simplicity’s sake, this Article will use traditional local language, but the unit of government should not affect the analysis unless it is a *federal* agency with other specific federal mandates over land use.

8. *See* Section IV *infra*; *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

9. *See, e.g., Huntington Branch*, 844 F.2d at 935–36; *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147–149 (3d Cir. 1977); *Smith v. Clarkton*, 682 F.2d 1055, 1065–66 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Arlington Heights II*, 558 F.2d at 1290; *Black Jack*, 508 F.2d at 1184–85; *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1559, n. 20 (11th Cir. 1984) (reaffirming the discriminatory effect doctrine for housing discrimination).

soon to be rejected by the high court. Now, however, we need to think through what precisely Title VIII disparate impact means.

This Article aims to fill this crucial gap by considering the hardest, and not surprisingly the most avoided, issue in fair housing disparate-impact claims, namely: when a municipality establishes zoning regulations that have a disparate impact against racial minorities, how good do the justifications have to be? These justifications do not stem from discriminatory intent—if they did, then disparate impact would not enter into it. Rather, they derive from other public policy considerations, many of which lie at the heart of local government authority. In light of *Inclusive Communities Project*, we can no longer neglect the conflict between fair housing and “Our Localism.”<sup>10</sup>

This Article first attempts to show that many land use regulations have disparate impacts against racial minorities, which establishes a *prima facie* case of liability under the FHA. These regulations have this effect by raising the cost of housing, and pricing minorities out of the market. Affordable and multifamily housing raise fair housing issues because racial minorities have substantially less income and wealth than whites.

This Article then argues that Title VIII disparate impact requires the judiciary to balance fair housing and local public policy considerations, and that the best way to do so is through the use of the “intermediate scrutiny” standard, which inquires whether the government’s justification is “substantially related to an important governmental interest.”<sup>11</sup> Such a framework is legally strong because Housing and Urban Development’s (HUD) recently-promulgated

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10. The quoted term was coined by Richard Briffault, as a play on Justice Frankfurter’s constant referencing of “Our Federalism.” See Richard Briffault, *Our Localism, Part I: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 n.1 (1990) (stating that “[t]he reference to ‘Our Federalism’ is intended”); Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990); Michael G. Collins, *Whose Federalism?*, 9 CONST. COMMENT. 75, 75–77 (1992) (discussing how Justice Frankfurter inserted the phrase “Our Federalism” into the Supreme Court’s discourse).

11. Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-based Affirmative Action Programs*, 21 J. GENDER, SOC. POL’Y & L. 797, 804 (2013). Intermediate scrutiny was first enunciated and applied in *Craig v. Boren*, 429 U.S. 190 (1976). James E. Fleming, *“There Is Only One Equal Protection Clause”: An Appreciation of Justice Stevens’s Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2301 (2006).

disparate-impact regulations,<sup>12</sup> explicitly upheld in *Inclusive Communities Project*,<sup>13</sup> directly point to it. Intermediate scrutiny also carries the policy advantage of underlining that the government's justification must be "important" from an external perspective: a land-use authority cannot avoid fair housing requirements by relying on weak or empirically suspect policy preferences.

"Balancing" and scrutiny formulations are notoriously imprecise. This Article therefore attempts to answer such concerns by considering four of the most common justifications for cities' rejections of more inclusive zoning and suggests how they should be analyzed under an intermediate scrutiny balancing test. It concludes that while these justifications can be upheld in some circumstances, such circumstances will be rare because they rest on fragile empirical grounds or less restrictive means exist to fulfill them.

Finally, this Article seeks to limit intermediate scrutiny by showing ways in which cities can avoid disparate impact liability through zoning adequately for multifamily and affordable projects. It thus connects two doctrinal lines that have previously been considered separately: Title VIII and the famous *Mount Laurel* framework adopted in New Jersey. It also points to California's Housing Element law as a template for how HUD could reduce municipalities' litigation burdens while fostering a greater supply of affordable units. There is no doubt that this will cut back on one aspect of local government power, but that is quite literally the price of equality—a price that Congress not only decided the nation should pay, but one that is in keeping with the most important promises of American life.

## I. TEXAS V. INCLUSIVE COMMUNITIES PROJECT

*Inclusive Communities Project* itself used a novel, although not implausible, theory for disparate impact liability, which turned on the Low-Income Housing Tax Credit (LIHTC) program.<sup>14</sup> Under that program, states receive a certain number of tax credits, which they

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12. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

13. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507, 2514–15, 2526 (2015).

14. *Id.* at 2513–14 (citing 26 U.S.C. § 42 (2015)).

distribute to affordable housing projects.<sup>15</sup> The idea is that projects will be able to sell—or “syndicate”—these tax credits to investors, who in exchange will provide the capital to construct and manage the project. In Texas, the agency responsible for distributing the tax credits is the Department of Housing and Community Affairs.

The plaintiffs sued because, they alleged, the Department was giving credits to those affordable housing projects in predominantly minority areas, reinforcing the state’s already high rate of segregation. The defendants countered that 1) they had no intention of doing so; because 2) the tax credit law seeks to use the funding streams to revitalize low-income areas, which are predominantly minority. So, it argued, all it was doing was following the tax credit statute.

Underlying the dispute was a long-running campaign by several groups—most notably financial institutions—to prevent Title VIII from imposing “disparate impact” liability in the first place. Although every circuit to consider the issue had held that disparate impact was permissible, the Fair Housing Act forbids discrimination “because of race”—language that these groups argued mandated some form of intent to discriminate.<sup>16</sup> It seemed that the Supreme Court was eager to agree with them. Twice before in the previous three years, the high court had taken a case to determine the issue only to have the case mooted when civil rights groups hastily settled on unfavorable terms, seemingly desperate to keep a case away from a very conservative Supreme Court.<sup>17</sup> Here, though, Texas refused to settle, perhaps driven by a conservative governor planning his second run for the Republican nomination and a state attorney general preparing to run for the soon-to-be vacant governorship. Most

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15. 26 U.S.C. § 42 (2015). An excellent summary of the tax credit law can be found in Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 HARV. L. & POL’Y REV. 521, 534–40 (2016).

16. See, e.g., Brief for the Am. Bankers Ass’n et al. as Amici Curiae supporting Petitioner, Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507 (2015) (no. 13-1371).

17. See Lyle Denniston, *New Fair Housing Case Settled*, SCOTUSBLOG (Nov. 13, 2013, 10:21 PM), <http://www.scotusblog.com/2013/11/new-fair-housing-case-settled/>. The cases granted certiorari and then dismissed upon settlement were Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011) and Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).

observers predicted the certain demise of a theory that had animated Title VIII for nearly half a century.<sup>18</sup>

Surprisingly, they were wrong. Unsurprisingly, the swing vote was Justice Kennedy's. Noting that every circuit had recognized disparate impact liability and that Congress amended the Fair Housing Act in 1988 with language that made virtually no sense without assuming such liability,<sup>19</sup> his opinion for the Court upheld a traditional, three-step process for assessing disparate impact:

First, the plaintiff must show that a policy or practice has a disparate impact on protected categories under the Act.<sup>20</sup> The Court cautioned that a "robust causality requirement" is necessary to avoid constitutional questions concerning the use of impermissible racial quotas.<sup>21</sup>

Second, once the plaintiff makes this *prima facie* showing, the defendant must adduce a "substantial, legitimate" interest for maintaining the policy or practice.<sup>22</sup> Because "[d]isparate-impact liability mandates the removal of 'artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies," defendants must have some "leeway to state and explain the valid interest served by their policies."<sup>23</sup>

Third, if the defendant produces such evidence, the burden shifts back to the plaintiff to prove that there exists a less restrictive means for achieving the defendant's policy goals.<sup>24</sup> If there is "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs,"<sup>25</sup> then liability would attach.

That seems simple enough. Justice Kennedy's opinion said that "[t]he FHA must play an important part in avoiding the Kerner Commission's grim prophecy that '[o]ur Nation is moving toward two societies, one black, one white—separate and unequal'" and acknowledged "the Fair Housing Act's continuing role in moving the

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18. See Alena Semuels, *Supreme Court vs. Neighborhood Segregation*, THE ATLANTIC (June 25, 2015), <https://www.theatlantic.com/business/archive/2015/06/supreme-court-inclusive-communities/396401/>.

19. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2519 (2015).

20. *Id.*

21. *Id.* at 2512.

22. *Id.* at 2515.

23. *Id.* at 2522.

24. *Id.* at 2518.

25. *Id.*

Nation toward a more integrated society.”<sup>26</sup> But it overlooked the genuinely hard problems that the disparate impact provision raises. Inside each of the steps of the process lie complexities that reveal severe policy conflicts. Before considering them, however, we should recall why this is such an important problem in the first place.

## II. THE IMPACT OF SEGREGATION

More than 70 years after Gunnar Myrdal identified racial segregation as a crucial part of the “American Dilemma,”<sup>27</sup> it still remains a serious problem. Some observers have disagreed: segregation, they argue, only reflects differing preferences for living with one’s kind, so fighting it represents a solution in search of a problem.<sup>28</sup>

Such a suggestion, however, collapses under the weight of growing strong social science evidence. In and of itself, racial residential segregation causes worse outcomes for subordinated minorities. In their landmark article, evocatively-titled *Are Ghettos Good or Bad?*,<sup>29</sup> David Cutler and Edward Glaeser found that outcomes for African-Americans varied strongly with the degree of black/white segregation in an individual’s metro area. Thus, twenty-to twenty-four-year-old blacks in metro areas with below-average segregation had a high-school dropout rate that was 19% lower than blacks in areas with above-average segregation, and (if they were working) average earnings about 16% higher than their high-segregation counterparts.<sup>30</sup> The younger (twenty- to twenty-four-year-old) blacks seemed to benefit more from desegregation than the slightly older (twenty-five- to twenty-nine-year-old) blacks, but in

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26. *Id.* at 2525–26.

27. *See* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY (1944). So influential was Myrdal’s work that the Supreme Court in *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 496 n. 11 (1954) simply cited it as “see generally.” The standard biography of Myrdal, which points to his impact on the American race debate is WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA’S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938–1987 (1990).

28. David Armor & W.A.V. Clark, *Housing segregation and school desegregation*, in *FORCED JUSTICE* 117–53 (1995).

29. David M. Cutler & Edward L. Glaser, *Are Ghettos Good or Bad?*, 112 Q. J. ECON. 827 (1997).

30. *Id.* at 845–47.

each of ten outcomes they examined, Cutler and Glaeser found things were better for blacks in lower-segregation metro areas.<sup>31</sup>

Moreover, Cutler and Glaeser found that the *magnitude* of segregation's effects was massive as well. Overall, they concluded that about one-third of the black-white gap on the various outcomes they measured would be eliminated if segregation levels fell by about one standard deviation—i.e., by about twelve points on the index of dissimilarity.<sup>32</sup> Importantly, they also found that the most significant beneficiaries from desegregation were blacks in the bottom half of the socioeconomic distribution.<sup>33</sup> A more recent article<sup>34</sup> by another economist, Elizabeth Ananat, also used an instrumental variable (in this case, the distribution of railroad tracks in urban areas) to model the effects of segregation on inequality and poverty, and again used 1990 data to measure outcomes. She also found substantial benefits to blacks from lower segregation (though somewhat smaller than those found by Cutler & Glaeser) and more consistent and measureable harms to whites.<sup>35</sup>

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31. *Id.* at 863–65. The most impressive part of Cutler and Glaeser's analysis, however, was the use of four different methods to test the durability of these initial results. For example, they recognized that their initial results might not reflect lower segregation improving black outcomes, but good black outcomes producing desegregation—what is known as an endogeneity problem, or circular causation. To address this, they used structural aspects of urban areas as an “instrument” for segregation—that is, they measured characteristics of metro areas that appeared to be completely independent of better black outcomes (such as the number of rivers passing through a metro area, or the number of political subdivisions) but which nonetheless correlated reasonably well with segregation levels. They then used these instruments to re-estimate the apparent effects of segregation on black outcomes. The effects were still there. Indeed, they were almost identical in size, and their strength increased the more accurate the instrument was. *Id.* at 857–69.

32. *Id.* at 865. As Cutler and Glaeser pointed out, the extrapolation of this finding implies that black-white differences in education, earnings, etc., could completely disappear if black segregation “disappeared”. But, of course, the benefits of desegregation might have diminishing returns, so such an extrapolation, without other support, would be unjustified.

33. *Id.* at 860–63. Cutler and Glaeser also find a very high (i.e., 0.69) correlation between black/white segregation and the intensity of economic segregation within the black community—something we should explore further.

34. Elizabeth Ananat, *The Wrong Side of the Tracks: The Causal Effects of Racial Segregation on Urban Poverty and Inequality*, 3 AM. ECON. J.: APPLIED ECON. 34 (2011).

35. *Id.* (Ananat's approach, however, seems to implicitly assume that these inter-metropolitan differences in segregation are very old, since segregation in her model assumes a particular intensity depending on the abundance of railroad tracks, which facilitated the creation of ghettos in the early 20<sup>th</sup> century, whereas



Might it be that while segregation harms Blacks, it actually helps whites? No. Lincoln Quillian, a sociologist at Northwestern University and a leading scholar on segregation, addressed the “white” issue head on by examining the impact of racial integration upon educational attainment.<sup>36</sup> Quillian found substantial positive effects for African-Americans, but no corresponding negative effect for Anglos.<sup>37</sup>

Epidemiologists have used the method of intermetropolitan comparison to examine the health effects of segregation, and have found strong relationships between lower segregation and a host of positive health outcomes for African-Americans: lower rates of hypertension, obesity, and infant mortality, to name a few.<sup>38</sup> Since this literature is examining metro-wide outcomes, and excludes recent in-migrants, the “treatment” effects of integration are easier to observe. There is less concern about reverse causality, because it is much less plausible that better health outcomes will lead to desegregation than that better health outcomes somehow prompt

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we believe the most important and instrumental changes in segregation occurred after 1970).

36. Lincoln Quillian, *Does Segregation Create Winners and Losers? Residential Segregation and Inequality in Education Attainment*, 61 SOC. PROBS. 402 (2014).

37. *Id.*

38. Virginia W. Chang, *Racial Residential Segregation and Weight Status Among US Adults*, 63 SOC. SCI. & MED. 1289, 1301 (2006) (noting the relationship between increased segregation and higher BMIs for African Americans); Irma Corral et al., *Residential Segregation, Health Behavior, and Overweight/Obesity Among a National Sample of African American Adults*, 17 J. HEALTH PSYCHOL. 371, 375 (2012) (“Segregation contributed to overweight/obesity . . . in that every 1-standard deviation increase in African American segregation was associated with a 0.423 increase in African American BMI, and a 14 percent increase in African Americans’ odds of being overweight.”); Kiarri N. Kershaw et al., *Metropolitan-Level Racial Residential Segregation and Black-White Disparities in Hypertension*, 174 AM. J. EPIDEMIOLOGY 537, 540 (2011) (finding “among blacks, living in less segregated areas was associated with lower hypertension prevalence”) [hereinafter Kershaw et al., *Metropolitan*]; Anthony P. Polednak, *Black-White Differences in Infant Mortality in 38 Standard Metropolitan Statistical Areas*, 81 AM. J. PUB. HEALTH 1480 (1991) (noting higher infant mortality rates in segregated areas); see also Kiarri N. Kershaw et al., *Racial and Ethnic Residential Segregation, the Neighborhood Socioeconomic Environment, and Obesity Among Blacks and Mexican Americans*, 177 AM. J. EPIDEMIOLOGY 299 (2013) (suggesting segregation is associated with lower obesity among Hispanics, which may mean segregation causes very different health effects for Hispanics).

lower segregation.<sup>39</sup> Moreover, scholars have had some success in identifying actual causal mechanisms that help explain the stronger health outcomes. For example, blacks in low-segregation metropolitan areas generally have better access to supermarkets and other sources of healthy food, as opposed to the “convenience stores” that dominate inner-city, segregated neighborhoods.<sup>40</sup> Stress levels and fear of crime are also measurably lower for blacks in desegregated metro areas, and lower stress feeds directly into several tangible health benefits.<sup>41</sup>

One of the most effective analyses in this field is by Ingrid Gould Ellen, who adopts some of the same techniques (instrumental variables, inter-metropolitan comparisons) developed by Cutler and Glaeser and applies them to a health outcome—specifically, the prevalence of low birthweight babies.<sup>42</sup> Low birthweight is a much more common phenomenon among black mothers than other racial groups, and has been strongly linked to a variety of other bad long-term outcomes, including worse health and lower cognitive skills.<sup>43</sup> Ellen also goes beyond the standard measure of segregation (the index of dissimilarity) to look at intermetropolitan differences in

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39. Moreover, the health studies usually control for individual effects that might lead to higher integration, such as income and education.

40. Corral et al., *supra* note 38, at 372 (“Segregated African American neighborhoods contain 2–4 times more fast-food outlets and convenience stores . . . , three times fewer supermarkets selling fresh produce . . . , and are three times more likely to lack recreational facilities than White neighborhoods of matched neighborhood socioeconomic status . . . . [T]hese neighborhood features contribute to health behavior and health status.”); Chang, *supra* note 38, at 1301 (“[T]here is . . . new empirical work linking segregation to specific neighborhood features such as supermarkets and the nutritional quality of local food selections.”).

41. Chang, *supra* note 38, at 1290 (explaining that “high crime rates can be prohibitive of outdoor activity,” contributing to weight outcomes) “[S]ocial isolation may also impede the diffusion of health-related information, and the multifarious nature of stress associated with living with concentrated poverty may precipitate both physiological and coping-type behavioral reactions that contribute to weight gain.” *Id.* at 1291; Kershaw, *Metropolitan*, *supra* note 38, at 543 (“Racial residential segregation leads to the inequitable distribution of social and economic resources. One way to cope with this chronic disadvantage is to engage in behaviors that may reduce feelings of anxiety or stress at the expense of physical health . . . . [B]lacks and whites living in integrated but poor areas may be more comparable in their exposure to individual- and area-level stressors and in their access to health-enhancing resources than blacks and whites living in less poor or more segregated areas.”).

42. Ingrid Gould Ellen et al., *Is Segregation Bad for Your Health? The Case of Low Birth Weight*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 203, 205, 209–15 (2000).

43. *Id.* at 203.

the centralization of blacks within a metro area, as a way of capturing the degree to which blacks are concentrated in older housing, more dated central services, and are more “fiscally isolated” from metropolitan resources.<sup>44</sup> Ellen finds a very strong link between segregation and low birth-weight among blacks,<sup>45</sup> and attributes the positive effects of higher integration to changes both in prenatal care and in the actual behavior of the mother.<sup>46</sup>

Two prominent labor economists, David Card and Jesse Rothstein, produced another foundational article in this literature in their 2008 study of the link between housing segregation and student test scores.<sup>47</sup> Card and Rothstein found that a one standard deviation decrease in racial segregation closed one-quarter of the white-black test score gap; and that housing integration is substantially more powerful in its impact than school integration.<sup>48</sup>

Four economists, led by Raj Chetty at Stanford University, have specifically investigated the role of housing segregation upon intergenerational mobility.<sup>49</sup> They found at least a very strong correlation between lowering housing segregation and improvements in intergenerational income mobility.<sup>50</sup>

Together, these studies point strongly to one conclusion: racial integration by itself is an enormously important policy goal. Conversely, the persistence of racial segregation remains a searing social problem that law needs to address.

### III. THE DECLINING SIGNIFICANCE OF ANTI-DISCRIMINATION LAW<sup>51</sup>

If segregation is such a problem, then why would standard disparate treatment fair housing enforcement not be adequate? The

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44. *Id.* at 212–15.

45. *Id.* at 216–17.

46. *Id.* at 218–21.

47. David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 2158 (2007).

48. *Id.* at 2159.

49. Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1608–11 (2014).

50. *Id.* at 1610–11.

51. The title of this Section references WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1st ed. 1978).

short answer is that dropping discrimination rates makes it clear that segregation must be tackled through different methods.

When Congress enacted the FHA in 1968, racial discrimination was routine, and many observers believed that eradicating intentional discrimination would suffice to eradicate segregation as well.<sup>52</sup> Such a view was too hopeful. The FHA's enactment led to significant drops in discrimination rates, as evidenced by a series of Housing Discrimination Studies (HDS) conducted by HUD in 1977,<sup>53</sup> 1989,<sup>54</sup> 2000,<sup>55</sup> and 2012.<sup>56</sup> Although generating top line numbers is complex, the trend is unmistakable: in 1977, Blacks faced discrimination about 27% of the time, and by 2012 that number had dropped to about 10%.<sup>57</sup> Importantly, the *type* of discrimination has also become less severe: Blacks today are almost never simply turned away,<sup>58</sup> and often the form of discrimination is that of demeanor or degree of assistance in terms of financing.<sup>59</sup>

Make no mistake: this is real discrimination, it is both illegal and immoral, and presents genuine costs to African-Americans searching for housing. But it is not nearly high enough to explain the persistence of high segregation rates. If segregation will be tackled, it

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52. Senator Walter Mondale, the chief sponsor of the Fair Housing Act, said the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

53. RONALD E. WIENK ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., MEASURING DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKET PRACTICES SURVEY (1979) [hereinafter WIENK].

54. The best summary and explanation of the 1989 HUD Housing Discrimination Study can be found in MARGERY TURNER, RAYMOND STRUYK, & JOHN YINGER, U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY SYNTHESIS (1991). This synthesis is the official HUD publication describing the 1989 study.

55. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000 (2002), [https://www.huduser.gov/portal/publications/hsgfin/hds\\_phase1.html](https://www.huduser.gov/portal/publications/hsgfin/hds_phase1.html).

56. U.S. DEP'T OF HOUS. & URBAN DEV, HOUSING DISCRIMINATION AGAINST ETHNIC AND RACIAL MINORITIES (2012) [hereinafter 2012 HUD Report].

57. WIENK *supra* note 53 at ES-28; 2012 HUD Report *supra* note 56 at 40.

58. 2012 HUD REPORT, *supra* note 56, at 39 ("When well-qualified minority homeseekers contact housing providers to inquire about recently advertised housing units, they generally are just as likely as equally qualified white homeseekers to get an appointment and learn about at least one available housing unit").

59. *Id.* at 53–54.

must be through other methods than standard anti-discrimination work, as important and morally compelling as that is.

#### IV. ZONING, LAND USE, AND RESIDENTIAL SEGREGATION

*[Zoning's] purpose is really to regulate the mode of living of persons who may here-after inhabit [the village]. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.*

— *Ambler Realty Co. v. Village of Euclid*,  
district court opinion.<sup>60</sup>

Land use regulations raise housing costs in numerous ways, but all essentially do so by restricting the amount of land available for development. Large-lot requirements, single-family-only zones, setback mandates, height restrictions, and parking minimums all mean that developers cannot use the available space for housing, and must use it for something else. Reducing supply raises costs, and land use regulations do that exceptionally well.

Such a supply restriction has profound racial implications. The wealth gap between whites and blacks is massive<sup>61</sup> and has vast implications for a wide variety of outcome measures. Given the role of wealth in both allowing Americans to purchase homes and maintain rents, higher housing costs figure to have an impact on segregation. The logic is compelling: if blacks have less wealth than whites, then many neighborhoods will financially be off-limits to them, and there

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60. *Ambler Realty Co., v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

61. See Tanzina Vega, *Blacks Still Far Behind Whites in Wealth and Income*, CNN (June 27, 2016, 2:49 PM), <http://money.cnn.com/2016/06/27/news/economy/racial-wealth-gap-blacks-whites/> (noting that the Pew Research Center “found that in 2013, white households in the U.S. had a median wealth of \$144,200—almost 13 times the median wealth of black households at \$11,200. But . . . the gap is not significantly narrowed by education. White households headed by someone with a college degree have a median wealth of \$301,300 compared to college-educated black households, which have a median wealth of \$26,300.”); see also, *On Views of Race and Inequality, Blacks and Whites are Worlds Apart*, PEW RESEARCH CTR., (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/>.

will be fewer blacks who can live in many more affordable neighborhoods. Furthermore, given the role of wealth in providing financial cushions to allow renters to tide over bad economic times, it also stands to reason that the failure to build multifamily units or affordable units will have a disparate impact on blacks and Latinos.

Not surprisingly, studies are emerging showing a link between overall housing density and reduced segregation. The lack of good comprehensive data on density has delayed research on this topic; early studies show suggestive connections, but are unable to be definitive. Rolf Pendall, for example, showed in 2000 that low-density zoning was associated with significant drops in African-American and Hispanic populations.<sup>62</sup> As better data has become available, the results show stronger connections. Matthew Resseger of Harvard University used spatial data available for all Massachusetts municipalities to see if zoning categories influenced block-level racial composition.<sup>63</sup> They did, powerfully. Blocks zoned for multi-family housing have black population shares 3.36 percentage points higher and Hispanic population shares 5.77 percentage points higher than single-family zoned blocks directly across the border from them.<sup>64</sup> His simulations showed that “over half the difference between levels of segregation in the stringently zoned Boston and lightly zoned Houston metro areas can be explained by zoning regulation alone.”<sup>65</sup>

The compelling logic plus the emerging empirics make the connection particularly salient, and important for legal doctrine. If land use regulations that allow for multi-family and affordable housing increase the numbers and percentage of black and Latino residents, then it follows that at least in many circumstances the converse is true: more restrictive land use designations will prevent blacks and Latinos from living in an area.<sup>66</sup> Even if cities lack any discriminatory intent, adopting such restrictive designations would

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62. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 139 (2000) (noting that the findings should be considered “exploratory” because a survey of planning directors, while the best that could be done under the circumstances of the time, does not adequately control for fixed community characteristics or the dynamics of community change and land use control).

63. Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders* (Nov. 26, 2013) (unpublished job market paper, Harvard University), [http://scholar.harvard.edu/files/resseger/files/resseger\\_jmp\\_11\\_25.pdf?m=1385500647](http://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf?m=1385500647).

64. *Id.* at 4.

65. *Id.* at 1.

66. It will not *always* be true, for reasons explored in Section VI *infra*.

represent a classic disparate impact. That forces us to reconsider the framework endorsed in *Inclusive Communities Project* because it calls into question the basic institutions and policies of American land use policy.

#### V. DISPARATE IMPACT CLAIMS: THE PRIMA FACIE CASE

Let us re-examine the three-step process for disparate impact claims: 1) a plaintiff must establish a *prima facie* case; 2) the burden shifts to the defendant to provide justification for its policy; and 3) the plaintiff may prevail by showing that there is a less restrictive means for achieving that policy.<sup>67</sup>

Most recent Title VIII litigation has run aground on Step One. For example, in *Reinhart v. Lincoln County*<sup>68</sup>, the defendant county, located in western Wyoming, re-zoned what had previously been one-acre lots to a minimum size of five acres. The plaintiff argued that the change made obsolete its previous business plan, which focused on building homes selling at approximately \$200,000.<sup>69</sup> The plaintiff's legal hook rested on its citation of statistics showing that members of minority groups have lower incomes than whites, and that therefore the increased cost of residential development and residential lots produced an impermissible disparate impact based on race.<sup>70</sup>

The Tenth Circuit rejected the claim, observing that mere lower income would not satisfy Step One.<sup>71</sup> Instead, the court observed, plaintiffs needed to show that 1) the increased costs of the homes would actually reduce the ability of minority groups to

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67. Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2514–15 (2015) (describing a regulation that set forth this three-step process).

68. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225 (10th Cir. 2007).

69. The Court noted:

Although the Reinharts repeatedly refer to their development plans as focused on “develop[ing] affordable lots” for ‘affordable housing,’ they do not contend that the lots they seek to sell, or the homes that would ultimately be built upon them, would qualify as “affordable” under regulations of the United States Department of Housing and Urban Development (HUD).

*Id.* at 1227 (citations omitted).

70. *Id.* at 1229–30.

71. *Id.* at 1230.

purchase those homes; 2) to a greater degree than whites in the relevant area.<sup>72</sup> Many land use regulations increase costs; in and of itself this would not violate the Fair Housing Act.<sup>73</sup>

Many Title VIII disparate impact cases have run aground on similar turf, which underlines a crucial point about them: such claims inevitably rely on a large amount of statistical evidence,<sup>74</sup> and this in turn means hiring at least one and perhaps several experts.<sup>75</sup> Such an effort gets expensive very quickly.

But what if the plaintiffs actually had made such a showing? As suggested above, this is hardly impossible, and in fact, quite probable in many circumstances. That would bring us to Step Two, and would reveal the genuine problem.

## VI. THE PROBLEM OF JUSTIFICATION

### A. The Inherent Difficulty

*What is the FHA analogue of “job related”? Is it “housing related”? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of “business necessity”? “Housing-policy necessity”? What does that mean?*

— *Inclusive Communities Project*,  
Justice Samuel Alito, dissenting<sup>76</sup>

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72. *Id.* at 1230–31.

73. *Id.* at 1231.

74. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:6 (2016) (“If a facially neutral policy is identified, the next step is for the plaintiff to present statistical evidence showing that this policy has a greater impact on protected class members than on others.”).

75. Interview with Christopher Brancart, Founding Partner, Brancart & Brancart, October 2013. Brancart is the principal of his eponymous firm, perhaps the leading Title VIII plaintiff’s firm in the United States. For a good summary of the firm’s cases, see *Some of Our Cases*, BRANCART & BRANCART, <http://brancart.com/cases.htm> (last visited Feb. 1, 2017); see also *Package Five: Making a Claim of Racial Discrimination Under the Federal Fair Housing Act*, LEGAL ACTION CTR., <https://lac.org/toolkits/housing/package5.htm> (last visited Jan. 29, 2017) (“[Mounting a Fair Housing Act challenge to a local policy] will require making a detailed and persuasive statistical demonstration of the policy’s effect. It is almost essential that you hire an expert who would be able to determine what the relevant data is, and accurately gather and analyze it.”)

76. Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2549 (2015) (Alito, J., dissenting).



Before addressing the highest court in the land, we might visit Sunnyvale, Texas, about twelve miles east of Dallas's central business district, and consider the federal court's brief description of the setting:

Nestled in the midst of towns defined by the shopping malls and dense apartment development for which the Dallas Metropolitan Area has become famous, Sunnyvale presents a stark contrast. It is a beautiful, rural, Texas town with almost 11,000 acres of rolling hills and green grassland and only 2,000 residents. Sunnyvale has no shopping malls and no apartment developments. The secret to Sunnyvale's success is its unusual zoning laws, including an outright ban on apartments and a one-acre zoning requirement for residential development.<sup>77</sup>

Sunnyvale is not alone: in his 2000 survey mentioned above, Pendall found that fully 15% of American municipalities surveyed would fall into the category of completely prohibiting all multifamily and affordable development.<sup>78</sup> And that, of course, understates the problem, because there are so many ways to raise the cost of housing that do not amount to a total ban. Municipalities require conditional use permits or other discretionary approvals, making the development process incredibly lengthy and costly; they may also impose height or setback restrictions that would do the same.<sup>79</sup> They allow multifamily housing, but only in extremely small areas within

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77. *Dews v. Town of Sunnyvale*, 109 F. Supp.2d 526, 529 (N.D. Tex. 2000). A good description of this litigation's background can be found in Alice M. Burr, *The Problem of Sunnyvale, Texas, and Exclusionary Zoning Practices*, 11 J. AFFORDABLE HOUS. & CMTY. DEV. L. 203 (2001–2002). See also Thomas Korosec, *Sunnyvale: The Whitest Town in North Texas*, D MAG., (Mar. 2012), <http://www.dmagazine.com/publications/d-magazine/2012/march/sunnyvale-the-whitest-town-in-north-texas/>.

78. See Pendall, *supra* note 62, at 130.

79. See, e.g., Edward L. Glaeser et al., *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 346–61 (2005) (suggesting that “some form of regulatory constraint means that t[he] cost of housing [for Manhattan condominium owners] is at least 50 percent more than it would be under a free-development policy” and that “[t]he impact of regulation on land values is much greater in other markets [than the New York metropolitan area]”).

their borders.<sup>80</sup> They mandate parking requirements that cause costs to skyrocket and make economically necessary density impossible.<sup>81</sup>

Yet cities with such or similar policies can easily present a race-neutral justification for them—and such justifications will hardly constitute pretexts for hidden discriminatory intent.<sup>82</sup> Cities will often favor single-family homes because they sincerely believe that this type of urban form raises property values for their residents.<sup>83</sup> Banning multifamily housing also means preventing the issues of traffic and congestion that are seen to come with such housing.<sup>84</sup>

And such prohibitions not only serve the economic interests of their residents, but also increase the municipal tax base, thus requiring a lower tax rate. Indeed, scholars have argued that such motivations constitute the essential core of local politics throughout

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80. See, e.g., SEATTLE HOUS. AFFORDABILITY AND LIVABILITY AGENDA COMM., FINAL ADVISORY COMMITTEE RECOMMENDATIONS TO MAYOR EDWARD B. MURRAY AND THE SEATTLE CITY COUNCIL, 21 (2015), [http://www.seattle.gov/Documents/Departments/HALA/Policy/HALA\\_Report\\_2015.pdf](http://www.seattle.gov/Documents/Departments/HALA/Policy/HALA_Report_2015.pdf) (noting that “opportunities to create new housing to help meet Seattle’s growing population and corresponding demand for housing are limited by the relatively small portion of Seattle’s land zoned for multifamily housing”).

81. See, e.g., Eric Jaffe, *The High Costs of Residential Parking*, CITYLAB, (Nov. 11, 2015), <http://www.citylab.com/cityfixer/2015/05/how-parking-keeps-your-rent-too-damn-high-in-2-charts/392894/>.

82. “Intent” is an equivocal word, particularly in this case. It can mean straightforward animus, but it can also mean a series of attitudes that reflect prejudice even if there is no conscious hatred. For example, David Freund has argued that whereas in the 1920’s, white homeowners simply hated blacks and wanted to keep them out of their neighborhoods, an ideological shift occurred, fostered in part by the real estate industry, which persuaded suburban white homeowners that African-American entrance into their neighborhoods would lower property values. See DAVID M.P. FREUND, *COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007). If held sincerely, this latter attitude would not constitute “animus” but would constitute discriminatory intent for the purposes of the Fair Housing Act as well as in terms of straightforward English meaning.

83. See William Stull, *Community Environment, Zoning, and the Market Value of Single-Family Homes*, 18 J. L. AND ECON. 535, 535 (1975) (“A frequently mentioned objective of municipal zoning ordinances is protection of property values”).

84. See Pendall, *supra* note 62, at 129 (noting that communities composed only of single-family homes likely have better services and less traffic than communities with both single- and multi-family homes).

the United States.<sup>85</sup> Moving directly to Step Three and requiring less restrictive means in such situations will not move the municipalities in the least. If the entire point of the policy is to preserve single-family homes with high property values, then it is hard to see what would constitute less restrictive means.<sup>86</sup>

This problem is unique to Title VIII, at least in the zoning cases. Compare this situation to those that arise under Title VII, the nation's employment discrimination law. Employment discrimination cases usually involve hiring and promotion policies, and the issue is whether the challenged practice, if it produces a disparate impact, is sufficiently "job-related."<sup>87</sup> In the touchstone case of *Griggs v. Duke Power*, the defendant's requirement that those applying for manual labor jobs have college degrees was ruled (correctly, in my view) not sufficiently job-related, and liability attached.<sup>88</sup>

Although litigants and scholars have and will continue to debate the necessity of the fit between job qualifications and disparate impact under Title VII, under the Fair Housing Act there seems to be no real analogue, the source of Justice Alito's complaint.<sup>89</sup> Yet simply to ask the question and point out its complexities is hardly dispositive. Congress never defined what it meant by "combination[s] . . . in restraint of trade"<sup>90</sup> or "monopolize,"<sup>91</sup> yet such ambiguity hardly demands a cramped reading of the Sherman Anti-Trust Act. For that matter, the framers never defined "due process of law."<sup>92</sup> While that is obviously a constitutional rather than a statutory provision, if anything this distinction militates in favor of

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85. See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2005).

86. An obvious riposte—zone for smaller single-family homes—will provide little assistance. Smaller lots mean lower property values, and thus more fiscal pressure, not to mention that the greater density will generate resistance from homeowners concerned about traffic, congestion, and a more working-class and low-income community.

87. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

88. *Id.* at 429, 436.

89. In one sense, there is something of an analogue in the public sector Title VII cases, because there, the degree to which something is "job-related" is more complex than in the private sector. Whereas in the private sector, the point of the job is to help a firm maximize profits, in the public sector this is far more equivocal. It is still not the same thing, however, because one can n, for example, a test a, for example, a test and a job.

90. 15 U.S.C. § 1 (2012).

91. 15 U.S.C. § 2 (2012).

92. U.S. CONST. amend. V.

a broader reading of the Fair Housing Act: unlike with a constitutional provision, Congress can always overturn a flawed reading of a statute if it so chooses. Thus, we cannot and should not avoid grappling with Step Two.

### B. HUD's Ambiguous Straddle

HUD's final regulations,<sup>93</sup> as upheld by the Court, do not resolve the issue. They state that the defendant must show that its policies or practices are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent"<sup>94</sup> and that the defendant's policy must be the least restrictive means<sup>95</sup> for achieving those interests. Cynics and comically-inclined jurists will quickly see the irony in such language, for it simultaneously mixes three different standards of review.

"Necessary" and the least restrictive means requirement implies strict scrutiny, as when the defendant must show that a law is "necessary to achieve a compelling governmental interest."<sup>96</sup> "Substantial" sounds in intermediate scrutiny, as when the question is whether a law is "substantially related to an important governmental interest."<sup>97</sup> And of course "legitimate" recalls rational basis scrutiny, as when a law is "rationally related to a legitimate governmental interest."<sup>98</sup> These formulations are far from word games, and they raise one critical—perhaps *the* critical—question for Title VIII disparate impact liability.

*Inclusive Communities Project* itself is equivocal. As noted above, it held:

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93. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460-11482 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

94. 24 C.F.R. § 100.500(c)(2) (2013).

95. 24 C.F.R. § 100.500(c)(3) (2013).

96. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992). Although Gerald Gunther famously declared that strict scrutiny is "strict in theory and fatal in fact," my colleague Adam Winkler has found that substantial percentages of strict scrutiny challenges fail, across a wide range of doctrinal areas. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795-96 (2006).

97. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

98. The Court uses this formulation even in cases where it arguably applies heightened scrutiny. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies . . . . The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.<sup>99</sup>

This formulation poses more questions than it answers. In a non-trivial sense, *all* land use regulations are “artificial,” and none of them, outside of clearly important public health and safety rules, can be said to be “necessary.” They may not be “arbitrary,” but of course any governmental regulation that is truly arbitrary, i.e. based solely upon capricious discretion, would be held unconstitutional under the Due Process Clause,<sup>100</sup> let alone the Fair Housing Act. Obviously the Court must have meant something more than literal arbitrariness. Nowhere did the Court define what it meant by “valid governmental policies.” And while the Court did take care to say that it was not asking governments to “reorder their priorities,” it did not answer the more fundamental question of what happens if their priorities actually “perpetuat[e] segregation.”<sup>101</sup>

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99. Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522 (2015) (citation omitted).

100. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963)) (“It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955).

101. One could read the Fair Housing Act as creating two distinct on-intent forms of liability: 1) disparate impact; and 2) perpetuation-of-segregation. See SCHWEMM, *supra* note 74, §§ 10:4, 10:7 (2016) (discussing disparate impact claims and perpetuation-of-segregation claims). In my view, these are essentially the same cause of action: Schwemm cites two cases as standing for the separate perpetuation-of-segregation claim, but they are also cited as disparate impact cases. See *id.* at § 10:7. He believes that the distinction between the two types of claims is that “it would generally not be appropriate to apply disparate impact analysis to a perpetuation-of-segregation claim that challenges only a single governmental act or decision.” *Id.* at § 10:6 n.2. But it is hard to see why. A single decision could have a disparate impact as much as a general policy. In any event, it is hard to distinguish a “single governmental decision” from a policy. A refusal to rezone, for example, could have a disparate impact by depriving minorities of the ability to live in a particular building to a greater extent than for whites,

### C. Slouching Toward Balancing

Shedding light on a possible solution requires us first to examine what the various circuits have done when confronted with the question, especially because the Supreme Court relied so much on the experience of the circuits in its decision. For the most part, they have adopted a somewhat aggressive stance concerning the importance of desegregation over other priorities.

In *United States v. City of Black Jack*, the first major case on Title VIII disparate impact, the Eighth Circuit held that “[o]nce the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.”<sup>102</sup> The court analogized to the equal protection strict scrutiny standard, and found such a standard appropriate for Title VIII Step Two.<sup>103</sup>

Subsequent circuits pulled back somewhat, although they often cited *City of Black Jack*. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the Metropolitan Housing Development Corp. (MHDC) contracted with the Clerics of St. Viator, who agreed to sell MHDC 15 acres of their property in the Village of Arlington Heights (“Arlington”) for MHDC to build racially integrated low- and moderate-income housing. When MHDC applied for the necessary zoning permits from Arlington, authorizing a switch from a single- to a multiple-family classification, Arlington’s Board of Trustees denied the request.<sup>104</sup>

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because a higher percentage of minorities would lose the opportunity to live there. Put another way, a single decision might perpetuate segregation *because* it has a disparate impact. It makes more sense, at least in land use cases, to have a unified analysis of both kinds of claims, and the fact that “a number of exclusionary zoning cases have involved both disparate impact and perpetuation-of-segregation claims,” underlines the point. *Id.*

102. *United States v. City of Black Jack Mo.*, 508 F.2d 1179, 1185 (8th Cir. 1974); Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 558 (2014).

103. *See City of Black Jack Mo.*, 508 F.2d at 1187 (citing *Shapiro v. Thompson*, 394 U.S. 618, 638 (1971)) (“To paraphrase the Supreme Court in *Shapiro v. Thompson*, we conclude that the City does not use and has no need to use the ordinance for the governmental purposes suggested.”); *see also* Schneider, *supra* note 102, at 559 (“[T]he Eighth Circuit relied on Equal Protection principles and disparate impact-oriented analogies to *Griggs*.”).

104. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1286 (7th Cir. 1977) (*Arlington Heights II*). This case is sometimes referred to as

After concluding that Title VIII authorized a disparate impact cause of action, the Seventh Circuit cautioned that a “per se” approach, under which a disparate impact by itself would lead to liability,<sup>105</sup> “would go beyond the intent of Congress and would lead courts into untenable results in specific cases.”<sup>106</sup>

Instead, the Court adopted a four-factor approach “discernible from previous cases”:

- (1) how strong is the plaintiff’s showing of discriminatory effect;
- (2) is there some evidence of discriminatory intent, though not enough to satisfy the [Equal Protection] standard . . . ;
- (3) what is the defendant’s interest in taking the action complained of; and
- (4) does the plaintiff seek 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.<sup>107</sup>

Applying these factors, the Court found the Village liable, but going forward, a few aspects of *Arlington Heights II* stand out. Most importantly, Prongs One and Three of the test explicitly contemplate balancing policy goals: how strong is the disparate impact versus the importance of the defendant’s action? And it very clearly asks the judiciary to perform this balancing.<sup>108</sup> Put another way, when the

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“Arlington Heights II,” to reflect its status as a remand from *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (*Arlington Heights I*), holding that liability under the Equal Protection Clause required proof of discriminatory intent. 429 U.S. at 265. The Supreme Court opinion specifically declined to consider Title VIII disparate impact issues. *Id.* at 271.

105. This would essentially turn Step One into the only step, which *Inclusive Communities Project* clearly forbade. *Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522–24 (2015).

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

107. *Id.*

108. *Arlington Heights II* was decided seven years prior to the Supreme Court’s landmark decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which held that the judiciary should defer to reasonable interpretations of statutes by agencies mandated to administer those statutes. Since HUD has this role under the Fair Housing Act, see 42 U.S.C. § 3608(a)

*Inclusive Communities Project* court asks judges to determine under disparate impact whether a barrier is “artificial, arbitrary, or unnecessary” it is not asking whether imposing that barrier is irrational: a barrier is artificial, arbitrary, or unnecessary when the disparate impact outweighs the defendant’s interest.

Second, that balancing tips toward the plaintiff where it is not asking the government itself to take on the burden of constructing housing. In retrospect, this is somewhat quaint: *Arlington Heights II* was decided in 1977, when the idea of government-constructed housing was still entertained as a public policy goal.<sup>109</sup> Forty years later, this is virtually never the case. Still, one should not overestimate the point. Most affordable housing is built with substantial government assistance in the form of tax credits; *Inclusive Communities Project* serves as a prime example of this model.<sup>110</sup>

More to the point, however, the Seventh Circuit’s distinction makes sense: if plaintiffs are asking nothing more than the right to build without government assistance, it would stand to reason that the government interest would be less.

Although it used different language, the Second Circuit in *Huntington Branch NAACP v. Town of Huntington*<sup>111</sup> took a similar view. In *Huntington Branch*, Housing Help, Inc. sought to build a multifamily apartment building that would depend upon federal subsidies for low-income residents, many (although not a majority) of whom were African-American.<sup>112</sup> The ninety-five percent white town only allowed privately developed multifamily units in its one urban renewal area, where fifty-two percent of the residents were already non-white, so in order for the project to have an integrative effect, it had to be placed in a white area, which forbade multifamily units.<sup>113</sup> The city refused to budge and denied the plaintiff a permit.<sup>114</sup>

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(2016), courts should welcome reasonable administrative guidance concerning the implementation of the disparate impact standard. This is what the Court did in *Inclusive Communities Project*, and in Section IX *infra*, suggesting other ways in which HUD can flesh out these regulations.

109. See D. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING (3rd ed. 2012).

110. *Inclusive Cmty. Project*, 135 S.Ct at 2513.

111. *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988).

112. *Id.* at 930.

113. *Id.* at 929–30.

114. *Id.* at 931–32.



Judge Kaufman's opinion for the Second Circuit joined every other circuit in explicitly endorsing disparate impact theory.<sup>115</sup> This was not only because disparate impact squared with legislative intent and with prior decisions, but also:

Practical concerns also militate against inclusion of intent in any disparate impact analysis. First . . . "clever men may easily conceal their motivations." This is especially persuasive in disparate impact cases where a facially neutral rule is being challenged. Often, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied. Second, inclusion of intent undermines the trial judge's inquiry into the *impact* of an action. The lower court's insistence on probing the "pretextual" nature of appellees' justifications vividly demonstrates the extent to which an intent-based standard can infect an analysis and draw it away from its proper focus.<sup>116</sup>

When it came to Step Two, the *Huntington* court observed that "in the end there must be a weighing of the adverse impact against the defendant's justification."<sup>117</sup> It acknowledged the central difficulty: "in Title VIII cases [unlike employment discrimination cases] there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related," and "[a] town's preference to maintain a particular zoning category for particular sections of the community is normally based on a variety of circumstances."<sup>118</sup> Such complexity, however, did not relieve the court of its central obligation "to assess whatever justifications the town advances and weigh them carefully against the degree of adverse effect the plaintiff has shown."<sup>119</sup> Balancing was and is the order of the day, and also the order of Title VIII.

One could take arbitrariness literally, and say that if a policy is genuinely not arbitrary—in other words, that it passes basic legitimacy under the rational basis test—then it is valid unless there

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115. *Id.* at 935–36.

116. *Huntington Branch*, 844 F.2d at 935 (quoting *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979)).

117. *Id.* at 936.

118. *Id.*

119. *Id.* at 936–37.

is a less restrictive means to accomplish the same goal (which actually might *make* it arbitrary). This is essentially the position taken by the First Circuit in *Langlois v. Abington Housing Authority*.<sup>120</sup>

*Langlois* concerned defendant Housing Authorities' administration of the federal Section 8 voucher program. After a lottery determining who would get on a waiting list for the chronically-oversubscribed program, the Authorities gave a preference to applicants currently living or working in the community where the Authority was located.<sup>121</sup> In other words, once it was established who made the waiting list and who did not, local residents on the waiting list moved to the front of the line for receipt of a Section 8 voucher. The Court agreed that there was at least some evidence to support a *prima facie* case for Step One.<sup>122</sup> "The more difficult question," the First Circuit rightly observed, "is justification".<sup>123</sup>

[I]t is a fair reading of the Fair Housing Act's "because of race" prohibition to ask that a demonstrated disparate impact in housing be justified by a legitimate and substantial goal of the measure in question; but beyond that, we do not think that the courts' job is to "balance" objectives, with individual judges deciding which seem to them more worthy. True, [*Arlington Heights*] did refer to balancing, but the few later circuit court decisions on point come closer to a simple justification test, and we think this is by far the better approach.<sup>124</sup>

Yet *Langlois*' approach itself is quite flawed. First, as noted above, it misstated the positions of the relevant circuits. Every circuit that has considered the matter in depth has adopted some form of balancing.<sup>125</sup>

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120. *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 48 (1st Cir. 2000).

121. *Id.* at 46.

122. *Id.* at 46, 49–50.

123. *Id.* at 50.

124. *Id.* at 51.

125. The First Circuit also cited *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), as an example of a court refusing to balance, but such a conclusion misreads that case. In *Rizzo*, the Court explicitly refused to flesh out

Second, *Langlois* conceded that HUD could itself require a stricter test than mere “simple justification.”<sup>126</sup> That is precisely what the Department did with the regulations at issue in *Inclusive Communities Project*, which of course were upheld.<sup>127</sup> Third, although not explicitly mentioned in *Inclusive Communities Project*, the Supreme Court has already rejected a rational basis test for Step Two. *Inclusive Communities Project* held that Title VIII Step Two is the equivalent of the “business necessity” defense in Title VII cases.<sup>128</sup> But “business necessity” requires a more searching inquiry than merely a race-neutral justification. If Title VIII Step Two requires only that, it has a more precise analogue: the “Reasonable Factor Other than Age,” or “RFOA,” justification under the Age Discrimination and Employment Act (ADEA). Under an ADEA disparate impact claim, if the plaintiff successfully makes a *prima facie* case, then the burden shifts to the defendant to set forth a Reasonable Factor Other Than Age.<sup>129</sup> That factor does not have to be “compelling” or even “substantial,” but merely “reasonable.”<sup>130</sup> Although it does call for accurately assessing the impact of the

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precisely what a Step Two analysis would be because it did not have to: the defendant city never rebutted the *prima facie* case. Thus,

[g]iven the absence of any justification for [defendant Housing Authority’s] actions, we obviously do not find it necessary to assess the legitimacy of their interests as against the discriminatory effect which their actions caused. Similarly, defendants’ failure to offer proof of justification renders fruitless consideration of any other factors under any standard which would implicate the discretion of the court in determining whether plaintiffs’ *prima facie* case had been overcome.

*Id.* at 150. *Rizzo* did reject *Black Jack’s* “compelling interest” test, *id.* at 148, but as this article argues, the issues surrounding the Step Two justification strongly resemble levels of scrutiny under the Equal Protection Clause—a view tacitly endorsed by the HUD regulations and *Inclusive Communities Project* itself.

126. See *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (“With possible qualifications, Congress might go further and determine that disparate impact alone should condemn a program or action, and an authorized agency might make the same choice[.]”).

127. *Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2510, 2514–15 (2015).

128. *Id.* at 2515–17.

129. 29 U.S.C. § 623(f) (2012).

130. *Id.*

regulation on older workers, it does not call for balancing that impact against the needs of the business.<sup>131</sup>

Fourth, as a matter of logic, a disparate impact standard in land use cases *must* be more than rational basis. Suppose that a city's zoning ordinance has a disparate impact, leading to Step Two. If the city could offer *any* legitimate policy, no matter how minor, this would be tantamount to saying that as long as its policy was not

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131. The EEOC identified the following factors that are relevant, although not dispositive, under the RFOA defense:

- The extent to which the factor is related to the employer's stated business purpose[.]
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination[.]
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate were known to be subject to negative age-based stereotypes[.]
- The extent to which the employer assessed the adverse impact of its employment practice on older workers[.]
- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(e)(2)(i)–(iv), (e)(3) (2012). The supplementary comment to the amended regulation candidly acknowledges that the EEOC has borrowed from tort law (which historically has governed personal injury and similar claims) to guide its definition of “reasonableness.” 77 Fed. Reg. 19083–86 (Mar. 30, 2012). This could in fact introduce some balancing considerations into the calculus, for as is well known, “reasonableness” in tort law balances the likelihood of harm with the cost of compliance. *See* *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (“Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .”). A cynic might suggest that a generally pro-plaintiff EEOC was attempting, through this comment, to inject balancing considerations into the record where putting them directly into the regulation would expose it to legal attack. But to the extent that the RFOA does introduce balancing, this would only serve to heighten the defendant's burden under Title VIII Step Two because “business necessity” is routinely acknowledged as a more demanding standard than RFOA.

driven by racial considerations it would be acceptable.<sup>132</sup> But that is the same thing as saying that there was no discriminatory intent, which is precisely what disparate impact analysis is not.

Finally, when considering how strong the defendant's justification must be under Step Two, we must recall the Fair Housing Act's goal of fighting residential segregation. Unquestionably, the statute rested upon an assumption privileging its purpose as an anti-discrimination law, similar to Title VII. But as Walter Mondale, the Act's chief co-author, stated, Title VIII sought to replace ghettos with "truly integrated and balanced living patterns."<sup>133</sup> He explicitly decried the prospect that "we are going to live separately in white ghettos and Negro ghettos."<sup>134</sup> He also argued that "one of the biggest problems we face is the lack of experience in actually living next to Negroes."<sup>135</sup> Indeed, the Supreme Court's very recognition of a disparate impact cause of action demonstrates that Title VIII is not merely an anti-discrimination law, but also one committed to fighting segregation. It dovetails well with the Court's historic commitment to recognizing the Act's "broad and inclusive"<sup>136</sup> reach, and thus giving it a "generous construction."<sup>137</sup>

In sum, then, Step Two in the land use cases under the Fair Housing Act requires a court to assess the importance of a city's justification for exclusionary zoning, and that in turn, requires the court to balance that justification against the disparate impact and segregative effect that the city's action takes. Such a balance, of course, will also comprise the *degree* to which different policies contradict each other. If, for example, the disparate impact is small, but the impacts on infrastructure are large, this would obviously tilt the balance toward the defendant.

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132. Note that the policy could not be frivolous, because then it would fall afoul of the Due Process Clause. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (noting that a statute would be upheld under rational basis review if it derived from "rational speculation.").

133. 114 CONG. REC. 3422 (1968).

134. *Id.* at 2276.

135. *Id.* at 2275.

136. *Trafficante v. Met. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

137. *Id.* at 212. In *Trafficante*, this language was used specifically for the Fair Housing Act's provisions on standing, but in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), the Court used these provisions in the context of generating a *substantive* result, *viz.* that family composition definitions were not maximum occupancy restrictions within the meaning of an exception to the Act, and thus those definitions were subject to the Act's compass.

#### D. Naming Intermediate Scrutiny

Such balancing is inherent in intermediate scrutiny, which is why the HUD regulations talk of a “substantial” government interest. For something to be “substantially related to an important government interest,” it must be *more* important than the alternative. If, for example, a municipality refuses to zone for multifamily housing because of traffic congestion, it must show that the potential traffic congestion problems will be worse than the benefits of the housing.

Suppose, for example, that a government agency seeks to justify a development near some critical habitat. An environmental organization protests and cites a peer-reviewed study finding that development would irreparably harm the habitat. The agency then responds with another peer-reviewed study finding that there would be no damage. Under the standard “substantial evidence” review standard, the agency would unquestionably win: the battle of the experts goes to the agency.

Now suppose that the environmental organization has not one study, but ten, and can show that the government’s study is the only one that has ever drawn a similar conclusion. That would present a much more formidable challenge to the agency. This is no longer a simple “battle of the experts”, but rather the great weight of scientific opinion militating against the government position. In the 1970’s, for a government agency to deny that human beings cause climate change through fossil fuel combustion would have been a reasonable position: today, 97% of scientists accept the theory of anthropogenic climate change.<sup>138</sup> What was once reasonable can hardly be called important now.

One might well ask why it is even necessary to put this balancing test within a scrutiny framework. Two reasons suffice. First, the Court, in upholding the HUD regulations, used language of substantiality and least restrictive means. Thus, tethering the balancing test in a scrutiny structure strengthens it legally. Second, balancing alone does not tell us much (at least not explicitly) about the *value* of the government’s justification. Suppose that reducing disparate impacts would be administratively difficult and complex for

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138. *The 97% Consensus on Global Warming*, SKEPTICAL SCIENCE, <https://www.skepticalscience.com/global-warming-scientific-consensus-advanced.htm> (last visited Feb. 28, 2017) (containing an excellent review of the scientific literature and specifically referencing the 97% statistic).

a government. In this case, the administrative difficulty could outweigh the reduction in disparate impact. Placing the balancing test within the rubric of intermediate scrutiny makes clear that the governmental interest must be “important” from an external (i.e. judicial) perspective and not simply from the standpoint of the government’s policy preference.

## VII. DEFINING INTERMEDIATE SCRUTINY

Thus, Title VIII Step Two requires balancing the government’s interest against the disparate impact, and this is inherent within intermediate scrutiny. But this does not satisfy the inquiry: what is intermediate scrutiny’s precise content? At times, it can resemble an ink blot; in Ashutosh Bhagwat’s words, it is “the test that ate everything.”<sup>139</sup> To answer simply that it constructs a “balancing test” only restates the problem, because balancing is a metaphor, not a legal test: no judge retires to her chambers and puts factors on a scale.

This problem is particularly salient because of the nature of land use cases that a genuine disparate impact cause of action could bring. In cases such as *Black Jack*, *Arlington Heights*, and *Huntington Branch*, nonprofit developers of affordable housing wanted permits to build a particular development.<sup>140</sup> But such a case-by-case approach is inherently limited in breaking down segregation. Developers will rarely want to challenge zoning and permitting on a case-by-case basis: they would far prefer to have rules in advance that allow them to build. Without such rules, they very well might give up construction of multifamily and/or affordable units altogether.

We need, then, consider the possibility of challenging the content of entire zoning ordinances, if they do not make adequate provision for the sorts of housing that can achieve integration. Here, balancing becomes more difficult because the considerations are so much broader. It is one thing to balance the denial of a particular development’s disparate impact against its projected burdens on

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139. See, e.g., Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

140. *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 929–30 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1007 (7th Cir. 1980); *United States v. Black Jack*, 508 F.2d 1179, 1181–83 (8th Cir. 1974).

health or safety; it is far more complex to consider it at a broader level. But this is what we must do if the Title VIII disparate impact promise is to be actually considered: if it is left to a series of individual challenges on individual projects, it will at best be a pale shadow of what it can be.

Thus, it makes more sense to look more closely at the sorts of justifications cities usually offer for exclusionary zoning and attempt to assess their strength under intermediate scrutiny.

#### A. Public Health, Safety, and Environmental Concerns

The most common justification municipalities offer to reject multifamily or affordable housing derives from public health and safety, such as adequate fire protection. Sometimes the justification also derives from environmental concerns, such as endangered species considerations. Although many of these objections are pretextual, they are not necessarily so, and a blanket rule dismissing them would run afoul not only of Congressional intent but also common sense. Can the circle be squared?

State laws have grappled with this problem. California's "Housing Element" Law, more fully discussed below, has arrived at a formula that attempts to balance health/safety concerns with worries about pretext. In particular circumstances, it allows a local government to reject an affordable housing development if it finds that

[t]he housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.<sup>141</sup>

The notion of a "specific, adverse impact" assists us. It must be "significant"—minor impacts do not count. It must be "quantifiable," which implies amenable to scientific recordation. It

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141. CAL. GOV'T CODE § 65583(g)(2)(A) (2016).



must be “unavoidable,” which points to Step Three. It must be based upon “objective, identified written public health and safety standards,” which represents a way of avoiding ad hoc inventions of problems, as well as again underlining the scientific basis of findings. As an additional protection, these standards must also exist at the time the application was complete, again attempting to block a bait-and-switch. A similar test for environmental impacts would be legally straightforward to add and judicially administrable.<sup>142</sup>

The California law allows the findings of such health and safety problems to be upheld if they are supported with “substantial evidence” in the record.<sup>143</sup> Intermediate scrutiny review, however, rejects such deference<sup>144</sup> because it places the burden of persuasion on

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142. Those concerned about environmental impacts might also rely on environmental review statutes, sometimes referred to as “little NEPAs,” which in some states require the assessment of a project’s significant environmental impacts and the accomplishment of feasible mitigation of these impacts to a level below the threshold of significance. *See, e.g.*, California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–178 (2016); State Environmental Quality Act, Environmental Conservation Law (“ECL”), N.Y. ENVTL. CONSERV. L. §§ 8-0101–17 (McKinney 2005 & Supp. 2012); Laurel Heights Improvement Ass’n. v. Regents of Univ. of California, 47 Cal.3d 376 (Cal. 1988) (outlining CEQA statute). Since such laws have existed literally for decades, in a state that includes such a law, compliance with it could qualify under the standard proposed here. There will be issues because in some circumstances the impacts will not be measured under “objective” standards, although since many environmental impacts are in fact scientific in nature, and because under relevant state law findings of any environmental review document must be supported with “substantial evidence” in the record, this will be a very rare occurrence. In any event, since under intermediate scrutiny judicial review will be *de novo*, it is highly unlikely the application of such statutes will serve as an illegitimate impediment to affordable housing construction. If a court finds under *de novo* intermediate scrutiny, that a project would produce immitigable significant environmental impacts, this could very well constitute a legitimate reason for project denial.

143. *See* CAL. PUB. RES. CODE § 21168.5 (2016) (An action “to attack, review, set aside, void or annul a determination, finding or decision of a public agency on the grounds of non-compliance” is limited to “whether there was a prejudicial abuse of discretion.” Abuse of discretion is established if the agency did not “proceed in a manner required by law” or if “the determination or decision is not supported by substantial evidence.”).

144. The Ninth Circuit has characterized the substantial evidence test as “extremely deferential” and stated that a reviewing court must uphold the agency’s findings “unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result.” *See Monjaraz-Munoz v. Immigration and Naturalization Serv.*, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003) (internal quotation marks and citation omitted). I find that arguments concerning precise degrees of deference are akin to medieval debates about how many angels can dance on the head of a pin. For present purposes, all

the government, not the plaintiff.<sup>145</sup> Under the “substantial evidence” test used in California law, and as is typical of administrative law formulations, doubts about the weight of evidence should be resolved in favor of the government; under intermediate scrutiny, however, the opposite is true.<sup>146</sup>

We thus have a way of analyzing health and safety concerns under Step Two of disparate impact: if the reviewing court finds, using its independent judgment, that a housing development would have a specific, adverse impact to health and safety under the statutory definition, then Step Two would be satisfied, and the plaintiff would have to find a less restrictive means to avoid such health and safety impacts.

### B. Traffic and Parking

Almost as common as public health and safety objections—and indeed, related to them—are objections concerning congestion. But it is much harder to take congestion seriously as outweighing the need for ending racial segregation. This is not only because of the *relative* merits of the considerations: however severe one might view traffic and parking problems, they cannot possibly be as significant as reducing residential segregation. Rather, the very nature of the problem makes it virtually certain to fail under intermediate scrutiny, because the way that municipalities measure them is so imprecise.

Municipalities often reject affordable and multifamily development because of what they argue will be inadequate parking, either in the development itself or in the surrounding neighborhood. Complying with parking requirements can quickly make a project

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we need do is accept that substantial evidence review requires the reviewing court to defer to the agency, a deference at odds with intermediate scrutiny.

145. This is the clear import of the cases regarding sex-based classifications, which are still formerly decided under intermediate scrutiny. One need not go as far as *United States v. Virginia*, 518 U.S. 515, 533 (1996), or *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982), both of which held that such classifications require an “exceedingly persuasive justification.” I simply argue that deference under the administrative law “substantial evidence” test is unwarranted here.

146. *See, e.g., Miss. University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.”).

uneconomical or undermine its affordability.<sup>147</sup> Yet such assessments are based on the flimsiest of evidence. As Donald Shoup has shown, parking standards essentially come from nowhere; more precisely, they come from planning manuals in the 1920's, which themselves were based upon nothing but uninformed estimates.<sup>148</sup> If, as the Supreme Court said, a government regulation can withstand rational basis scrutiny if it rests on "rational speculation unsupported by evidence or empirical data,"<sup>149</sup> the speculation itself must be rational to begin with, and thus many parking standards might not pass muster. It follows that they would also fail under the more searching inquiry of intermediate scrutiny. Shoup, together with planners from the left and the right, argue for a more market-based system: since developers have little incentive to build inadequate parking (because prospective tenants will balk), the market is, while hardly perfect, a better way of establishing enough parking for a development.<sup>150</sup>

Traffic usually presents a tale of classic unintended consequences. If a city determines that a development would cause unacceptable traffic impacts, its usual response is to mandate that the developer pay for mitigation measures such as street-widening. Alternatively, it can simply deny the permit altogether. But either of these cures is often worse than the disease. Street widening means that the road will be able to bear more traffic, which means that it will *attract* more traffic, thus aggravating the very problem the

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147. The literature demonstrating this point is vast. The White House recently issued its "Housing Development Toolkit," which identified off-street parking requirements as one of the major impediments to housing development. *See* THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (2016), [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf). A recent academic example is found in TODD LITMAN, VICTORIA TRANSPORT POLICY INSTITUTE, PARKING REQUIREMENT IMPACTS ON HOUSING AFFORDABILITY (2016), <http://www.vtpi.org/park-hou.pdf>. Indeed, an entire Facebook group, the "Shoupistas," is devoted in large part to this topic, and named after Donald Shoup, who pioneered this field of study. *See* The Shoupistas, FACEBOOK, <https://www.facebook.com/groups/70015940360/> (last visited Feb. 20, 2017). Shoup's most recent intervention in this specific area is found in his article "The High Cost of Minimum Parking Requirements." *See* Donald Shoup, *The High Cost of Minimum Parking Requirements*, 5 TRANSPORT AND SUSTAINABILITY 87 (2014).

148. DONALD SHOUP, THE HIGH COST OF FREE PARKING (rev. ed. 2011). Shoup himself compares parking standards to the pseudoscience of phrenology. Personal conversation with Donald Shoup, Professor of Urban Planning at University of California Los Angeles, (Mar. 17, 2016).

149. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

150. *See* SHOUP, *supra* note 148.

mitigation was designed to solve. If the development is denied altogether, that creates the effect of pushing development farther out into more distant suburbs, and generating regional traffic impacts. For these reasons, analysts have rightfully criticized traffic mitigation measures required by environmental review statutes for producing more traffic.<sup>151</sup> There is a law of conservation of traffic that cannot be solved by the denial of land use permits or ever-larger traffic mitigation requirements. The problem was succinctly described by America's pre-eminent transportation analyst, Anthony Downs:

My advice to Americans stuck in peak-hour traffic is not merely to get politically involved, but also to learn to enjoy congestion. Get a comfortable, air-conditioned car with a stereo radio, a tape player, a telephone, perhaps a fax machine, and commute with someone who is really attractive. Then regard the moments spent stuck in traffic simply [. . .] an addition to leisure time.<sup>152</sup>

Other transportation analysts are somewhat more optimistic, but their solutions—or perhaps more honestly, their ameliorations—of traffic depend not on permit denials; indeed, they often stress

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151. See, e.g., SAN FRANCISCO PLANNING AND URBAN RESEARCH ASSOCIATION, FORM AND REFORM: FIXING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 2 (2006), [https://www.spur.org/sites/default/files/publications\\_pdfs/SPUR\\_FixingCEQA.pdf](https://www.spur.org/sites/default/files/publications_pdfs/SPUR_FixingCEQA.pdf) (“Yet viewed broadly, CEQA has contributed to sprawl and worsened the housing shortage by inhibiting dense infill development far more than local planning and zoning would have done alone.”); Sarah Bernstein Jones, *Adopt ‘Miles Traveled’ Measure to Discourage Harmful Sprawl*, S.F. CHRON. (Jan. 21, 2016), <http://www.sfchronicle.com/opinion/openforum/article/Adopt-miles-traveled-measure-to-discourage-6772373.php>. In order to change this pattern, in 2013 California adopted SB 743 (Steinberg), which changed the way in which traffic impacts are assessed under its environmental review statute. Specifically, SB 743 requires the Governor’s Office of Planning and Research (OPR) to amend the CEQA Guidelines to provide an alternative to LOS for evaluating transportation impacts. Particularly within areas served by transit, those alternative criteria must “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.” CAL. PUB. RES. C. § 21099(b)(1) (2014).

152. ANTHONY DOWNS, STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 164 (1992). Downs’ aphorism reveals the pace of technological change: no one in 2016 attempting to acquire an attractive mode of automobile transport would be so backwards as to have a “tape player” in her car, especially since tape cassettes are no longer being produced.

denser development as a partial solution to the problem.<sup>153</sup> Others stress market-oriented policies such as congestion pricing, synchronized traffic signals, one-way lanes, High-Occupancy Toll (HOT), and Bus Rapid Transit service.<sup>154</sup> But virtually no transportation planner recommends slow-growth policies because they recognize that these policies simply divert traffic rather than reducing it.

Thus, recall Step Two: would denial of affordable or multifamily housing constitute something substantially related to an important government interest? This excursus into transportation planning reveals that the answer is no. It is questionable to argue that traffic and parking should trump integration as a policy goal, but when the very policies municipalities advance are generally recognized as ineffective or even detrimental, they cannot withstand intermediate scrutiny.

### C. Fiscal Zoning

More formidable and genuine problems arise when municipalities seek to avoid multifamily and affordable units due to public finance, which as noted above, probably explain the predominant reason for just about any local policy. But they loom large when considering whether to approve multifamily and/or affordable housing. Multifamily housing, of course, means more families per acre, and more families per acre usually means more children. More children means more students, and local governments are loathe to incur the cost of building and maintaining schools as well as parks and other facilities that children use.<sup>155</sup>

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153. See, e.g., Orit Mindali, et. al., *Urban Density and Energy Consumption: A New Look at Old Statistics*, 38 TRANS. RESEARCH PART A: POL'Y AND PRAC. 143, 147 (2004) (noting the conventional wisdom that denser development is more likely to result in people living closer to work and other services—making the car optional rather than necessary).

154. See, e.g., PAUL SORENSON ET AL., RAND CORPORATION, REDUCING TRAFFIC CONGESTION IN LOS ANGELES (2008), [http://www.rand.org/pubs/research\\_briefs/RB9385.html](http://www.rand.org/pubs/research_briefs/RB9385.html).

155. See CHITTY CHITTY BANG BANG (Warfield Productions 1968) (evil Baroness Bomburst in fictional nation of Vulgaria despises children and hires a “child-catcher” to keep them in a dungeon, hoping to expel all children from the nation). Local governments in the United States have taken a lesson from Baroness Bomburst.

Recall, however, that local governments are creatures of their states.<sup>156</sup> Municipal fiscal incentives are not “brooding omnipresence[s] in the sky,”<sup>157</sup> but rather deliberate creations of public policy, through state constitutions and statutes. To say that a city’s fiscal incentives constitute substantial enough interests to override disparate impact is to say that state laws should trump the Fair Housing Act.

Yet there is little reason to believe that this should be so. The real problem in considering fiscal zoning as an adequate reason is that by itself, it is not a *reason* at all. The real “reason” here is the decision of the state to set forth a particular type of “fiscal constitution”<sup>158</sup> in the first place. Why has the state constructed a system in which each city has the fiscal incentive to zone out affordable and multifamily uses?

Framing the question this way essentially restates, in more deferential form, the holdings of state courts that because cities are creatures of the state government, their legitimate interests must extend farther than simply their own municipal boundaries.<sup>159</sup> It does not rule out cities focusing only on their own populations, but does require some sort of credible reason for their doing so, based upon the *state’s* fiscal constitution.

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156. A related although doctrinally distinct point was made several decades ago in an important article by Larry Sager. See Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 795 (1969) (noting the relevance of Dillon’s Rule for Equal Protection analysis).

157. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

158. By “fiscal constitution,” I mean not only those state constitutional provisions controlling the power to tax and spend among the various and branches and levels of state and local government, but also “framework statutes and legislative and administrative practice” concerning state and local public finance. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 595 (1988) (defining “fiscal constitution” in these terms).

159. The two most famous opinions holding this are *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, (N.J. 1975) [hereinafter *Mount Laurel I*], and *Assoc. Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 488 (Cal. 1976). Other state supreme courts requiring local governments to require regional effects when passing zoning ordinances include *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991); *Nat’l Land Invest. Co. v. Kohn*, 215 A.2d 597, 612 (Pa. 1965); *Save a Valuable Env’t. v. Bothell*, 576 P.2d 401, 405 (Wash. 1978). New York mirrors California’s *Livermore* decision. See *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975).

One could actually imagine a reason, perhaps stemming from Charles Tiebout's famous theory that if local jurisdictions can choose the levels of taxes and public services they want, a system of local governments can achieve an efficient production and distribution of public goods.<sup>160</sup> But no state government actually resembles anything close to that. To return to the intermediate scrutiny standard, a state under Step Two would have to show that its fiscal constitution represents a clear and ordered set of policy priorities that are substantially advanced by its particular fiscal rules. Then under Step Three, it would have to show that these methods are the least restrictive means for doing so. Few, if any, states can satisfy these standards.

States usually attempt to justify beggar-thy-neighbor local fiscal incentives with the phrase "local control." But this obscures more than it reveals. Local control of what? Not land use itself: that is not at issue when thinking of the state's fiscal constitution. Rather, it is local control of local public finance. States, however, do not actually mean this: they do not allow cities to refuse to provide schools for their residents or refuse to provide utilities to those within their jurisdictions.<sup>161</sup> They have rules about whether and under what conditions municipalities may incorporate and disincorporate, and what kinds of taxes they can raise or fees they can charge.<sup>162</sup> A majority of states still adhere to some form of Dillon's Rule, which states that localities only have those powers expressly granted to them by the state.<sup>163</sup>

Perhaps because state fiscal constitutions are messy and contradictory political compromises, the Court has decided that the Fair Housing Act is to be read broadly<sup>164</sup> and refused to defer to states

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160. See generally, Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

161. E.g., ME. CONST. art. VIII, Pt. 1, Pt. 2 §§ 1–2 (2016); ME. STAT. tit. 20-A, Pt. 1 § 2 (2016).

162. E.g., ARIZ. REV. STAT. ANN. § 9-101 (2016); *Gesler v. City of Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76 (Ohio 2013); *In re City of Kinloch*, 362 Mo. 434 (Mo. 1951).

163. Delegation of powers by legislature—Municipal powers under Dillon's rule, 2 MCQUILLIN MUN. CORP § 4:11 (2016); *Local Government Authority*, NATIONAL LEAGUE OF CITIES, <http://www.nlc.org/local-government-authority> (last visited Feb. 6, 2017).

164. Cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972); *City of Edmonds v. Oxford House*, 514 U.S. 725, 731 (1995) (reading *Trafficante's* admonition for a "generous construction" of the Act as including substantive terms).

in its interpretation of the Act. Such messiness is perfectly justifiable as a general matter, but when a federal civil rights statute declares that its goal is to provide for fair housing throughout the United States, states must do better than justify their fiscal constitutions on the basis of the best political deal. The fiscal constitution must substantially advance an important state interest if it will trump the Fair Housing Act, and few, if any, will actually do so. Little wonder, then, that when considering Title VIII the Court has refused to apply “federalism” canons of construction that read federal statutes narrowly if they impinge upon areas of “traditional state authority,”<sup>165</sup> of which land use certainly would be one. In the most recent case considering land use restrictions, the Court held that Title VIII preempted a local ordinance without even pausing to consider federalism canons.<sup>166</sup>

In sum, then, cities might be able to use fiscal incentives as justification for their restrictions on multifamily and affordable housing, but they would face the formidable obstacle of demonstrating coherent, consistent, and significant policies underlying their fiscal constitutions in order to do so. Few will be able to.

#### D. Property Values

Neighbors frequently protest the siting of multifamily and affordable housing near their homes, but not necessarily for reasons of racial hostility or prejudice. Their opposition derives instead from a fear of how any new development will affect their home values. “I don’t own my house,” a woman protesting a child care center in her neighborhood told a zoning administrator, “[m]y house owns me.”<sup>167</sup> As noted above, the desire to preserve and augment home values might be the single most important touchstone of local politics.<sup>168</sup> When confronted with multifamily and affordable housing, homeowners’ fears that such developments will bring not only traffic

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165. *Contra* Gregory v. Ashcroft, 501 U.S. 452 (1991).

166. In dissent, Justice Thomas specifically pointed to the federalism canons as a reason to reject pre-emption, but only acquired two other votes for this argument. *See* City of Edmonds, 514 U.S. at 743 (Thomas, J., dissenting) (“The majority’s interpretive premise clashes with our decision in *Gregory v. Ashcroft* . . .”).

167. Personal recollection of author. The hearing occurred in 1996.

168. *See* FISCHER, *supra* note 85.



and congestion, but crime, disorder, and lower-performing schools are actual and genuine.<sup>169</sup>

Lawrence Sager, who wrote about this problem a half century ago, was somewhat cynical:

The issue may be one of social, or less delicately, of snob values. The proposition is simple: People like to live in exclusive neighborhoods because of the status and congeniality that they may expect to derive from their neighbors (and their neighbors' large houses), and they are prepared to pay for the privilege. That the poor or the near poor are more apt to be black or brown may enhance the feeling. Zoning restrictions that cater to these tastes thus increase the value of the affected property.

The argument is not only simple, it is pernicious . . . . [T]o employ property values as a basis for excluding the poor from neighborhoods is to employ the apparent neutrality of dollar valuation as a means of placing government in a posture of implementing preferences it is constitutionally estopped from accommodating. If this were acknowledged as justificatory here, presumably much the same argument would apply to overt racial zoning.<sup>170</sup>

Since Sager's words appeared, of course, the Supreme Court has in fact ruled that poverty is not a suspect classification.<sup>171</sup>

Still, his argument has enormous purchase for the question of justification under Step Two. If, in fact, justification on the basis of property values is illegitimate or insubstantial—if in fact it is simply

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169. Skeptics may protest that fears of crime, disorder, and lower-performing schools are themselves proxies for racial animus or at least racial fears. This may be true in many circumstances, but it is extremely difficult to prove and is precisely the reason why many advocates and scholars favor disparate impact liability in the first place.

170. Sager, *supra* note 156, at 795.

171. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19–25 (1973). At least that is the conventional understanding of *Rodriguez*, and there is no need to revisit it here. Many scholars have done so, however, and one can hope that the Supreme Court reconsiders the question.

an artifact of snob value—then a court determining disparate impact under Title VIII would easily be within its rights to reject it.

To dismiss the concern for property values as mere snobbery, however, resembles something close to snobbery itself. Most Americans' wealth relies heavily, if not exclusively, upon their home values.<sup>172</sup> That wealth provides the basis for their families' economic security in the event of economic misfortune; it also provides for a more adequate retirement than Social Security, or even for their childrens' college education. To dismiss it as snobbery not only risks political backlash, but is also deeply unfair to the millions of Americans—virtually none of them wealthy—who are attempting to ascend the economic ladder.

Instead, however, there is a (relatively) easy way out. Lost in the discussion of the legitimacy of the property value argument is the more fundamental question of its validity. This empirical evidence is particularly important because if intermediate scrutiny means anything, it means that the government's justification must be true, or at least have real, credible evidence behind it. It is not good enough to retreat and say that a reasonable legislator could have believed it: that, of course, sounds in rational basis. Rather, the government bears the burden of credibly demonstrating that changes in a zoning ordinance would reduce property values.

We actually know very little about whether this is so. The few studies that exist, however, show that the existence of affordable housing has at best negligible effects, and often have highly positive ones.<sup>173</sup> As a practical matter, then, instituting intermediate scrutiny

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172. Household wealth represents about half of the net worth in the entire United States. See MATTEO IACOVIELLO, HOUSING WEALTH AND CONSUMPTION (2011), <https://www.federalreserve.gov/pubs/ifdp/2011/1027/ifdp1027.pdf>. Since in the United States, wealth distribution is highly unequal, with the top 1% of the United States owning more than 40% of all wealth, it stands to reason that for the remaining 300 million or so Americans, home wealth figures to be the lion's share of most Americans' wealth. Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%*, VANITY FAIR (May 2011), <http://www.vanityfair.com/news/2011/05/top-one-percent-201105>; Jordan Weissmann, *Yes, U.S. Wealth Inequality is Terrible by Global Standards*, THE ATLANTIC (Mar. 11, 2013), <http://www.theatlantic.com/business/archive/2013/03/yes-us-wealth-inequality-is-terrible-by-global-standards/273908/> (discussing severe wealth inequality in the United States.).

173. See Lance Freeman and Hilary Botein, *Subsidized Housing and Neighborhood Impacts: A Theoretical Discussion and Review of the Evidence*, 16 J. PLAN. LITERATURE 359, 366–71 (2002). Interestingly enough, the neighborhoods that *do* suffer property value declines are low-income black neighborhoods, perhaps because “the potential positive externalities associated with the spot

will have the effect of nullifying the property values justification because of the absence of evidence for it. This absence of evidence might be good enough for rational basis, but not for anything more heightened.

In any event, as with many health and safety impacts, property value declines can be handled under Step Three. In 1999, Robert Shiller and Allan Weiss published a landmark article proposing “Home Equity Insurance,” as a way to protect house values against real estate market declines.<sup>174</sup> Since then, Shiller and Weiss’ idea has been subject to several studies demonstrating its usefulness, and the product is now being offered on the private market.<sup>175</sup> Municipal bulk purchase of such a product (presumably at reduced rates) is far less burdensome on housing production than simply refusing permission to build in the first place. It would thus serve to defeat any municipal objections based upon home price decline. Indeed, it might give homeowners a windfall because it pays off on the occasion of any home price decline, not just those caused by affordable or multifamily housing.

Skeptics might argue that home equity insurance is inadequate, because while it protects against housing price *declines*, it will not compensate neighbors whose homes appreciate less than they otherwise would have in the absence of affordable or multifamily housing. The response here is two-fold. First, we run up again against the absence of evidence. As the old saying goes, “absence of evidence is not evidence of absence,” but for the purposes of intermediate scrutiny, it might as well be. The Fair Housing Act rejects the idea that residents of affordable and multifamily units must demonstrate that they are not, in the words of the Supreme Court, “mere parasite[s].”<sup>176</sup> Secondly, and relatedly, the argument from home price

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rehabilitation in poor, black-occupied neighborhoods [are] small compared with the accompanying negative externalities from adding more low-income households to the area.” *Id.* at 370, quoting Anna M. Santiago, George C. Galster, & Peter Tatian, *Assessing the Property Value Impacts of the Dispersed Housing Subsidy Program in Denver*, 20 J. POL’Y. ANALYSIS, 65–88 (2001).

174. Robert J. Shiller & Allan N. Weiss, *Home Equity Insurance*, 19 J. REAL EST. FIN. & ECON. 1, 21–47 (1999).

175. See, e.g., *New Insurance Protects From Falling Home Values*, REALTOR MAG. (Nov. 22, 2013), <http://realtormag.realtor.org/daily-news/2013/11/22/new-insurance-protects-from-falling-home-values> (describing AmTrust Financial Services’ product); *Price-Protect Your Home*, FORBES MAG. (Aug. 29, 2002), <http://www.forbes.com/2002/08/28/0829whynot.html> (describing RealLiquidity’s home equity services).

176. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

*appreciation*, as opposed to declines, posits that the investment of those who already own homes is more important to augment—as opposed to maintain—rather than giving those who do not own homes the right to a place to live. It is hard to see under what circumstances intermediate scrutiny would strike that balance.

### VIII. HOW FAR DOES THIS GO?

Skeptics might wonder whether this entire framework proves too much. After all, if the refusal to zone for any multifamily units creates a disparate impact, why stop there? Conceivably, since the offering of any single family home instead of a multifamily unit would create a disparate impact, and the reasons proffered would not be adequate, this could lead to an outright prohibition on zoning for single-family homes. Indeed, this could be a major reason why judges and scholars have been reluctant to explore the implications of disparate impact on land use. And given HUD's intermediate scrutiny regulations and the Supreme Court's explicit endorsement, we might expect litigation not just concerning the zoning of a single parcel, but rather challenging a municipality's entire zoning ordinance as a way of facilitating affordable and multifamily development and not forcing developers to bear the litigation costs themselves.<sup>177</sup> Thus, broaching the question of limits cannot be put off.

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177. *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 529 (N.D. Tex. 2000), is one of the few FHA cases so far to challenge the structure of a city's entire zoning ordinance. But in light of the developments discussed, it is not unreasonable to expect more. Indeed, The Inclusive Communities Project, which was the plaintiff in the eponymous Supreme Court suit, has now raised a new challenge to the town's only-slightly amended zoning ordinance. *See Inclusive Cmty's Project v. Town of Sunnyvale*, Case 3:12-cv-00146-P (N.D. Tex.) (Jan. 16, 2012). According to the plaintiffs' attorneys' website:

While this second suit was pending, the Town recruited a low income housing tax credit developer for a different site on the south side of the Town. The Town rezoned this site twice in order to allow the LIHTC developer to receive an award of housing tax credits. The tax credits were awarded and the development of the 96 units of low income affordable rental housing in Sunnyvale is proceeding. Based on this progress, ICP dismissed the second lawsuit. If the development is built and accepts housing choice vouchers, the Town will satisfy the settlement and the contempt remedy order. 26 years after the litigation was filed, there will be 96 units of low income housing in the Town of Sunnyvale. The Town has resisted this result for many years.

### A. Generating Equilibrium

It need not be this way. As noted above, intermediate scrutiny essentially generates a balancing test, as the *Arlington Heights II* and *Huntington Branch* courts recognized.<sup>178</sup> A desire to maintain and increase property values is not “substantial” in a city that has completely or even largely excluded multifamily and affordable units.

But what if the city has made a good-faith, credible effort to be inclusive? After a certain point, the city’s policies become more substantial because substantiality is a relative term. Thus, a municipality’s policy goal of lowering density to reduce congestion, or preserving owner-occupied units for issues of social cohesion (“no one ever washes a rented car”) would not be “substantial” if it were largely single-family owner-occupied homes to begin with. These policies would carry far greater weight, however, in a city that has already zoned and planned for substantial numbers of multifamily and affordable units.

This sort of sliding scale is not simply true as a legal matter; it also will play out on the ground. To see why, let us examine two recent disparate impact cases.

In *Hallmark Developers v. Fulton County*,<sup>179</sup> the developer sued after the defendant county denied the developer’s application to rezone land to build a mixed-use development, including affordable housing. Although the developer’s expert testified that such a denial would have a disparate impact on minorities, the Eleventh Circuit rejected the claim because, it said, the rest of the relevant area—which the court (unpersuasively) held was the entire southern portion of Fulton County—had an oversupply of homes in the developer’s project price range.<sup>180</sup> The court reasoned that “[i]f there is a glut in the market of homes in Hallmark’s projected price range, the lack of Hallmark’s particular development is not likely to have an impact on anyone, let alone adversely affect one group

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*Representative work done by Daniel & Beshara, P.C. for the Inclusive Communities Project, Inc.*, DANIEL & BASHARA, P.C., <http://www.danielbesharalawfirm.com/Pages/RepresentatieworkdonebyDBPCfortheInclusiveCommunitiesProjectInc.aspx> (last visited Feb. 9, 2017).

178. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 936–37 (2d Cir. 1988).

179. *Hallmark Developers v. Fulton Cty.*, 466 F.3d 1276 (11th Cir. 2006).

180. *Id.* at 1287.

disproportionately.”<sup>181</sup> *Hallmark* points to the equilibrium effect alluded to above: to the extent that a municipality plans adequately for affordable and multifamily housing, this will make it more difficult to make a *prima facie* case in the first place.

*Avenue 6E Investments v. City of Yuma*<sup>182</sup> underlines the same point, although importantly it reached a different conclusion. There, the situation was the same as *Hallmark*: the defendant city refused to rezone the developers’ land to permit higher-density housing, and the defendant argued that denser development was available in another part of town, thus undermining the allegation of disparate impact.<sup>183</sup>

But this time, the Court rejected the defendant’s assertion because the area that the Yuma asserted would be available to racial minorities was simply too big, which might increase segregation rather than diminish it.<sup>184</sup> If a city could point to any part of an entire county to show an adequate amount of higher-density housing that more members of minority groups could purchase or rent,

[i]t would permit cities to block legitimate housing projects that have the by-product of increasing integration simply by scouring large swaths of a city for housing in another part of town that is largely populated by minority residents, that does not compare in any number of respects to the neighborhood in which the developer has sought rezoning, or that is, in fact, far less desirable in general.<sup>185</sup>

Adopting the *Hallmark Developers* reasoning, the Ninth Circuit concluded, “would threaten the very purpose of the FHA.”<sup>186</sup>

*Avenue 6E Investments* puts a crucial caveat on the equilibrium highlighted in *Hallmark*: simply because a municipality allows for an adequate *amount* of affordable and multifamily housing

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181. *Id.*

182. *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493 (9th Cir. 2016).

183. *Id.* at 499 (“Developers determined that development of the Property . . . was no longer financially feasible . . . . They determined, however, that there existed a need in Yuma for more affordable housing.”).

184. *Id.* at 511–12.

185. *Id.* at 511.

186. *Id.*

to be built, this does not by itself alter the fundamental real estate rule of location, location, location. It would be a strange irony—and as the Ninth Circuit observed, completely counter to the FHA’s purpose<sup>187</sup>—if a municipality could pack all of its affordable and multifamily units into one small section of its jurisdiction.

The overall point concerning equilibrium, however, holds: if a municipality zones and plans for an adequate *amount* of affordable and multifamily units in a way that does not aggravate segregation and reduces it, then it need not worry about the prospect of disparate-impact Title VIII lawsuits because potential plaintiffs will have a much harder time making a *prima facie* case, and there will be far fewer people who would be interested in being such plaintiffs in the first place.

### B. A Regulatory Solution

Merely to establish such a sliding scale, however, evades the question of how precisely it should slide. Acknowledging necessary judicial discretion does not relieve us of the burden of trying to state how it should be exercised. In the fair housing context, however, an important tradition allows the judiciary—and hopefully, HUD—to gain crucial guidance.

Section 808 of the Fair Housing Act requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” fair housing policies.<sup>188</sup> This mandate seems obvious: of course one would expect HUD to affirmatively further fair housing. The history, unfortunately, belies such an expectation, as the Department has dragged its feet for nearly a half century: the disparate impact regulations upheld in *Inclusive Communities Project*, dating from 2014, were the first ever issued.<sup>189</sup> But the mandate remains and it bears particular relevance for exclusionary zoning.

Since the Act creates disparate impact liability that could require rezoning, and since HUD must administer the Act to further fair housing policies, it follows that HUD must provide guidelines as to how the sliding scale would work. In other words, the Act implicitly requires HUD to develop a framework for municipalities seeking to

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187. *Id.*

188. 42 U.S.C. § 3608(e)(5) (2012).

189. *See* Implementation of the Fair Housing Acts Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

establish zoning that would comply with fair housing law. And in fact, this is just the sort of thing that a federal department could do quite well. At the simplest level, it would involve two things: (1) developing policy models delineating how a municipality could determine its fair share of regional or state affordable housing need; and (2) issuing regulations that would provide municipalities with some measure of liability relief if it planned, zoned, and took other necessary steps to meet this need.

Developing data is one thing—skeptics might say perhaps the *only* thing—that HUD has done well since its creation. Indeed, data development is essentially the one thing contained in the Department’s new (although quite tepid) “Affirmatively Furthering Fair Housing” Regulations.<sup>190</sup> Formerly, HUD required recipients of funds under the department’s most important aid programs—such as the Community Development Block Grant (CDBG) and HOME Investment Partnerships program—to produce an “Analysis of Impediments to Fair Housing,” reports that critics such as the Government Accountability Office (GAO) derided as essentially ineffective.<sup>191</sup> The new regulations promote an “assessment tool” to enable recipients—a category which includes virtually every relatively significant municipality in the nation—to determine the barriers to fair housing in their jurisdictions. This tool will serve as the centerpiece of a new “more effective and standardized” Assessment of Fair Housing (AFH)<sup>192</sup> and is mandatory for recipients.<sup>193</sup>

Importantly, AFHs do not limit themselves to assessments of discrimination. For purposes of the rule, HUD states that

Affirmatively Furthering Fair Housing (AFFH) . . . means ‘taking meaningful actions, *in addition to combating discrimination*, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to

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190. The final rule may be found at 24 C.F.R. §§ 5, 91, 92, 570, 574, 576, 903 (2017), and was originally reported at 80 Fed. Reg. 42271–42371 (July 16, 2015).

191. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-905, HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 9–15 (2010) [hereinafter *GAO Report*].

192. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42273 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

193. 24 C.F.R. § 5.154 (2015).



opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means *taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns*, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.<sup>194</sup>

In other words, program participants must use their planning processes to remove disparate impacts, and this extends to “*all . . . activities and programs relating to housing and urban development.*”<sup>195</sup> The rule clearly implies, then, that participants' planning and zoning ordinances cannot run afoul of intermediate scrutiny. And that implication in turn means that the assessment tool should include measures for estimating potential housing demand in regions throughout the United States, with each jurisdiction's projected fair share of affordable housing.

Planning and zoning in accordance with the requirements of HUD's assessment tool would, under this framework, give the municipality's actions a strong presumption of validity, thereby furthering the rule's goal of reducing “litigation pertaining to the failure to affirmatively further fair housing.”<sup>196</sup> If a municipality met its projected fair share, its zoning, even if it created a disparate impact in terms of the *amount* of affordable housing,<sup>197</sup> would be deemed to be legitimate if the city used neighborhood property values, or even fiscal considerations, as policy justifications.

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194. *Affirmatively Furthering Fair Housing (AFFH) Final Rule*, HUD EXCHANGE, <https://www.hudexchange.info/programs/affh/> (last visited Feb. 21, 2017) (emphasis added).

195. *Id.* (emphasis added).

196. *See* Department of Housing and Urban Development, 80 Fed. Reg. 42273 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

197. The caveat concerning “amount” of affordable housing is crucial, because cities might still place all of their affordable or multifamily housing stock in one area of their jurisdiction, thereby entrenching segregation. *See* discussion *supra* pp. 141–42.

The central problem with the rule is that HUD has made it essentially toothless: although program participants must certify that they are Affirmatively Furthering Fair Housing, so far there are no penalties for not using the required AFH process.<sup>198</sup> But such a problem could be partially solved by the incentives of a litigation safe harbor, incentives that could also be loudly referenced by local officials eager to avoid the wrath of neighborhood NIMBY activism.

If such a scheme seems familiar, it should: it resembles New Jersey's famous *Mount Laurel* framework for mandating and allocating affordable housing throughout the Garden State.<sup>199</sup> The literature on *Mount Laurel* has felled forests and will continue to do so. For our purposes, we can summarize it as follows:

- (1) In 1975, the New Jersey Supreme Court declared that each municipality had to plan and zone for its fair share of affordable housing;
- (2) For eight years, the state legislature and every township essentially ignored the first holding, the court took matters into its own hands, stripping localities of their zoning powers until their ordinances complied with *Mount Laurel* principles. The court split New Jersey into three jurisdictions, and appointed a trial judge in each region to approve new ordinances and grant builders' remedies to developers wanting to construct new housing;
- (3) A political outcry forced the legislature to move, which it did by creating a state "Council on Affordable Housing" ("COAH") responsible for assigning each township a regional housing number that it had to provide for in its municipal ordinance. Although COAH severely reduced the number of required affordable housing statewide, and the Legislature allowed townships to buy out 50% of their affordable housing number if it could

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198. See 42 U.S.C. § 3608 (2012) (describing the administration of the Fair Housing Act but including no penalty for failure to affirmatively further fair housing).

199. More precisely, it resembles the framework originally established by the *Mount Laurel II* decision. See *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983). The two most outstanding books on the *Mount Laurel* litigation are CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); and DAVID KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1997).

find a receiving city (virtually always a poor, predominantly minority city such as Newark or Camden), the Court, under severe political pressure, upheld the scheme in 1986.

Since then, the outcome of *Mount Laurel* has been the “proverbial half-full, half-empty glass.”<sup>200</sup> J. Peter Byrne reported in 1997 that “by 1993, 14,000 units of low and moderate income housing had been or were being built in the New Jersey suburbs . . . 14,000 units equal 9% of total New Jersey housing permits during the period; moreover, another 11,000 units had been rehabilitated and land for another 30,000 had been appropriately zoned.”<sup>201</sup> David Kirp and his colleagues found that the lion’s share of these units were for working-class families and the elderly, leading the caution concerning whether *Mount Laurel* was truly succeeding in its effort to desegregate the state.<sup>202</sup> By 2011, COAH itself put the number at more than 60,000 new units and almost 15,000 rehabilitated, with about an additional 50,000 new units planned and 10,000 more proposed for rehabilitation.<sup>203</sup> Although falling short of what the *Mount Laurel* judges originally saw as the needed number, COAH represents more units of affordable housing than the 33,000 units added under the Low Income Housing Tax Credit program (LIHTC), the principal affordable housing program in the nation.<sup>204</sup>

One might wonder why we do not have more current statistics than 2010–11, and that in and of itself reveals a lot. During his successful run for Governor in 2009, Chris Christie called *Mount Laurel* “an abomination” and vowed to abolish it.<sup>205</sup> The regulation he pushed through was declared unconstitutional by the state Supreme

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200. J. Peter Byrne, *Are the Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2273 (1997) (reviewing HAAR, *supra* note 199 and KIRP ET AL., *supra* note 199).

201. *Id.*

202. See KIRP ET AL., *supra* note 199, at 186–92.

203. See COUNCIL ON AFFORDABLE HOUS., PROPOSED AND COMPLETED AFFORDABLE UNITS (2011), <http://www.nj.gov/dca/services/lps/hss/transinfo/reports/units.pdf>; see also Jake Blumgart, *The Fight for the Mount Laurel Doctrine*, NEXT CITY (Feb. 4, 2013), <https://nextcity.org/daily/entry/the-fight-for-the-mount-laurel-doctrine>.

204. Brian N. Biglin, *More Affordable Housing, But Where, and For Whom? A New Jersey Study Revealing the Low Income Housing Tax Credit’s Impact, and the Ongoing Concentration of the Poor*, 9 CORNELL REAL EST. REV. 48, 52 (2011).

205. Chris Christie, *Chris Christie — Mt. Laurel Decision is an ABOMINATION*, YOUTUBE (Sept. 16, 2011), <https://www.youtube.com/watch?v=MWRSpKkoQnc>.

Court two years later, and the Court recently also held that towns were responsible for housing needs that had accumulated from a sixteen-year gap period of unenforcement due largely to the Christie Administration's policies.<sup>206</sup> Governor Christie's hatred for the law is not unique: his Republican predecessor Thomas Kean also despised the law,<sup>207</sup> and affordable housing mandates are, for reasons pointed to earlier, unpopular among suburban voters. This means that we should not expect affordable housing disparate impact litigation to integrate the country by itself, but rather to constitute one part of a portfolio of strategies.

An equally good template to *Mount Laurel*, which also reveals its political pitfalls, is California's law that requires municipalities to prepare a Housing Element for their general plans.<sup>208</sup> Such a Housing Element must "identify sites that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels."<sup>209</sup> Together with regional councils of governments, California's Department of Housing and Community Development (HCD) projects each municipality's share of "regional housing need" (known as the Regional Housing Needs Assessment, or "RHNA"), and each Housing Element strives to show (even if it does not actually show) how the city's planning and zoning laws will meet that need.<sup>210</sup> If HCD finds that a municipality's Housing Element passes muster under state requirements, then it is presumed valid in the event of any litigation.<sup>211</sup>

California's Housing Element law has hardly generated the hundreds of thousands of affordable units that the state needs; indeed, a 2003 study found little difference between those jurisdictions that complied with state requirements and those that

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206. *In re the Declaratory Judgment Actions Filed by the Various Municipalities*, 2017 WL 192895 (N.J. Jan. 18, 2017); *see also*, Laura Denker, *N.J. Supreme Court Affirms 'Gap Period' Needs, Rejects Towns' Attempts to Exclude Thousands*, FAIR SHARE HOUSING CTR. (Jan. 18, 2017), <http://fairsharehousing.org/blog/entry/n.j.-supreme-court-affirms-gap-period-needs-rejects-towns-attempts-to-exclu/>.

207. Jill P. Capuzzo, *Mount Laurel: A Battle That Won't Go Away*, N.Y. TIMES (Nov. 25, 2001), <http://www.nytimes.com/2001/11/25/nyregion/mount-laurel-a-battle-that-won-t-go-away.html>.

208. CAL. GOV'T CODE § 65581 (West 1980).

209. CAL. GOV'T CODE § 65583.2(a) (West 2016).

210. *Id.*

211. CAL. GOV'T CODE § 65589.3 (West 1990).

did not.<sup>212</sup> But the law has suffered from substantive gaps that the Legislature has been slow to close, most importantly, the lack of any requirement that cities actually hit their RHNA number.<sup>213</sup> Instead, a municipality need only make “adequate provision for the existing and projected needs of all economic segments of the community.”<sup>214</sup> And since the judiciary has deferred to cities’ determinations of their own needs and refused to defer to HCD’s inadequacy determinations, cities have often honored Housing Element law in the breach.<sup>215</sup>

But there is no reason why this need be so with HUD and disparate impact, especially given the powerful mandate to reduce residential racial segregation. Indeed, a HUD framework could be simultaneously more rigorous and less intrusive. A HUD Housing Element could simply state that adhering to a departmental RHNA number would insulate a city from disparate impact litigation concerning the overall number of affordable housing units in a zoning ordinance. If a municipality chose not to adhere to it, it would then take its legal chances—essentially the situation that already exists.

Moreover, like the *Mount Laurel* framework, the Housing Element law suffers from political implementation barriers that would be less likely to occur with HUD guidelines. HCD is under constant attack from powerful lobbies for California’s local governments: if a battle concerning enforcement arises between these lobbies and affordable housing advocates, the former almost invariably wins. This is especially true because local officials are crucial constituencies for state legislators. Although this is to some extent the case with HUD and members of Congress, the connection is attenuated, and Congress members have more constituencies to look after and listen to. The very distance between HUD and localities insulates it. This condition, of course, can create massive problems of its own, but in the case of fair housing enforcement, such

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212. See generally PAUL G. LEWIS, CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE (2003) (parenthetical needed). Partially in response to Lewis’ study, the Legislature tightened the Housing Element law in 2004, mandating explicit provision of specific sites where affordable and multifamily development can occur. CAL. GOVT. CODE § 65583.2 (West 2004).

213. CAL. GOVT. CODE § 65583.2 (West 2004).

214. CAL. GOVT. CODE § 65583 (West 2016)

215. See, e.g., *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 3d 374 (Cal. Ct. App. 2007). In fairness to the *Fonseca* appellate court, Cal. Govt. Code §65589.3 which says that HCD findings of adequacy create a presumption of adequacy, clearly states that negative HCD findings do not create a presumption of inadequacy. But a fair reading of the case also shows the court bending over backwards to find the city in compliance with the Housing Element law.

insulation is beneficial, as we have seen from the New Jersey and California cases.

In sum, then, either the judiciary or, more reasonably, HUD itself, could and should issue rules and standards setting forth when municipalities' commitments to allow affordable and multifamily housing shut off a land-use disparate impact claim. Such a rule would give cities the incentive to rewrite their zoning codes to conform to the Fair Housing Act while also making it clear that after a certain point, federal interference is no longer warranted.

### C. Embracing the Bottom Line

Supreme Court precedent already suggests the validity of such an approach, albeit in a backhanded sort of way. In *Connecticut v. Teal*, the defendant State used a promotion examination that had a disparate impact against minorities.<sup>216</sup> In order to correct for this disparate impact, the state then selected from the resultant pool of successful test-takers a disproportionate number of blacks.<sup>217</sup> This method resulted in the number of those eventually being promoted that allegedly corrected for the initial disparate impact.<sup>218</sup> And that, the State argued, meant that it did not violate Title VII, an argument sometimes called the "bottom-line" defense<sup>219</sup>—an argument similar to the notion advanced in this section.

The Supreme Court rejected the argument, holding that Title VII prohibited discrimination against *individuals*, and thus it did not matter whether group outcomes were equal.<sup>220</sup> But for our purposes, the key point was the Court's legal reasoning: it pointed to specific provisions in Title VII that focused on discrimination against individuals.<sup>221</sup> Such language, however, does not exist in the Fair

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216. *Connecticut v. Teal*, 457 U.S. 440, 442 (1982).

217. *Id.* at 444.

218. *Id.* at 445.

219. *Id.* at 442.

220. *Id.* at 453–56.

221. *Id.* at 445–51. Specifically, the Court focused on Section 703(a)(2) of Title VII, which reads in relevant part:

It shall be an unlawful employment practice for an employer— . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

Housing Act, suggesting that a bottom-line defense *is* available for land-use fair housing questions.<sup>222</sup>

Moreover, it makes sense that such individualistic language does not exist in the Fair Housing Act. The nature of disparate-impact housing discrimination claims, at least in the land use cases, diverges sharply from an employment discrimination claim, even a disparate-impact employment discrimination claim. In *Teal*, even though the defendant reached the desired number of African-Americans in employment, the examination it used wrongly screened out *other*, individually specific, African-Americans who might have attained employment, but for the inappropriate test. In the same way that Title VIII in land use lacks an analogue to the notion of job-relatedness, it lacks an analogue to individuals inappropriately screened out. Since land use restrictions date back to the 1920's, it is not as if a specific set of individuals was screened out by them. Moreover, in contrast to employment discrimination claims, the different members of the disadvantaged group lack specific individual differences that are relevant in the process of choice. The relevant group members are essentially equivalent in that they lack the adequate wealth and income to purchase homes in the particular municipality.<sup>223</sup> It thus makes sense for a bottom-line defense to be available for municipalities that have zoned and planned for their fair share of affordable housing in the relevant area.

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otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.* at 445–46 (quoting 78 Stat. 255, as amended, 42 U.S.C. 2000e–2(a)(2)).

222. I want to emphasize that this discussion of the bottom-line defense is specific to *land use* claims within Title VIII. In other areas, such as e.g., disparate-impact *lending* cases, the considerations might be different, and in fact more analogous to *Teal*. An African-American denied a loan based on inappropriate underwriting criteria will not be and should not be assuaged by the bank's defense that it corrected for these criteria another stage of the loan process. Unpacking such problems must, of course, await future work.

223. An illuminating discussion of the mixed nature of individual and group rights in civil rights law can be found in Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1721–35 (2001). Professor Gerken identifies a fear of “essentialism” as driving the Court's reluctance to look at group rights' claims. Such essentialism considerations are not at issue in the Title VIII land use context because they involve income and wealth, not race *simpliciter*.

#### D. A National Fair-Share Standard

Allowing a bottom-line defense, then, generates an unanticipated conclusion: applying intermediate scrutiny could create something close to a national fair share standard for multifamily and/or affordable housing. Such a standard would not constitute a requirement. Municipalities would not have to use a bottom-line defense, and HUD could reject using the Affirmative Furthering Fair Housing rule to construct affordable housing targets for local governments. But doing so in each case would reduce the probability of wasteful and contentious litigation, and it would demonstrate the ability of the Fair Housing Act to fulfill its promise of half a century ago.

#### CONCLUSION

A skeptic might wonder this entire Article has represented a classic case of old wine in new bottles.<sup>224</sup> Debates over exclusionary zoning are nothing new, and fair housing advocates identified the problem in a serious and detailed way more than half a century ago.<sup>225</sup> But when old wine goes into a new bottle, it assumes a different shape and a new image, and it can be perceived in radically different ways. Indeed, this is what advocates often do: Reconceptualize older arguments in a new form that makes it more persuasive and compelling. This Article has attempted to do so.

Much work still needs to be done to put flesh on the bones laid out here, although I have done my best to begin the process. Exactly how should we define the relevant area for determining a disparate impact?<sup>226</sup> How coherent does a state's fiscal constitution have to be to pass muster under intermediate scrutiny?<sup>227</sup> What do we do if cities begin to find genuine infrastructure problems with multifamily and affordable housing?<sup>228</sup> For now, answering those questions can wait, but they cannot wait forever.

And raising them underlines perhaps the most important point: enforcing Title VIII in the land use policy space will curtail

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224. Interestingly, despite the prevalence of this phrase, Jesus' original parable considered *new* wine in *old* bottles. See *Matthew* 9:14–17; *Mark* 2:21–22; *Luke* 5:33–39.

225. See Sager, *supra* note 156.

226. See *supra* Section IX(A).

227. See *supra* Section VIII(C).

228. See *supra* Section VII(D).



“Our Localism,” in the same way that federal civil rights enforcement has always done. If, at the end of the day, the nation decides to reject it, we should at least be honest about it, and freely admit that equality has a price that we do not wish to pay.

#### EPILOGUE, 2017

As this Article was going to press, Donald J. Trump was elected President of the United States (despite the fact that his opponent, Hillary Clinton received nearly 3 million more votes).<sup>229</sup> Trump does not figure to support fair housing; indeed, his initial appearance in *The New York Times*, more than four decades ago, came when he was sued by the Department of Justice for rampant housing discrimination.<sup>230</sup> He settled without admitting guilt, but the Department of Justice produced ample evidence that race discrimination was rampant in his buildings.<sup>231</sup> Moreover, his

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229. See Gregory Krieg, *It's Official: Clinton Swamps Trump In Popular Vote*, CNN POLITICS (Dec. 22, 2016, 5:34 AM), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/>.

230. Morris Kaplan, *Major Landlord Accused of Antiracial Bias in City*, N.Y. TIMES (Oct. 16, 1973), <http://www.nytimes.com/1973/10/16/archives/major-landlord-accused-of-antiracial-bias-in-city-us-accuses-major.html>.

231. See Steve Contorno, *True: Hillary Clinton Says Federal Government Sued Donald Trump for Housing Discrimination*, POLITIFACT (Sept. 27, 2016, 1:28 AM), <http://www.politifact.com/truth-o-meter/statements/2016/sep/27/hillary-clinton/true-hillary-clinton-says-federal-government-sued-/>. The Politifact article relates:

Black people, the government found, were often told a Trump Management complex had no availability when apartments were available for rent.

In one instance, a black man asked about two-bedroom apartments at Trump's Westminster complex in Brooklyn on March 18, 1972, and a superintendent told him nothing was available. On March 19, 1972, the black man's wife, who was white, visited the complex and was offered an application for a two-bedroom apartment on the spot.

The government lawyers also interviewed several people who said executives for Trump Management discouraged rental agents from renting to black people. In one case, the government said the company's comptroller instructed a rental agent to attach a sheet of paper that said "C" for "colored" to every application submitted by a person of color.

campaign—as well as his personal history—was marked by his consistent use of racist themes and remarks.<sup>232</sup> His candidacy announcement smeared millions of Mexican immigrants as “rapists”<sup>233</sup> and he later argued that a federal judge presiding over a lawsuit for fraud involving “Trump University” could not be impartial because of Mexican ancestry—a view that House Speaker Paul Ryan, who endorsed Trump for president, described as a “textbook definition of a racist comment.”<sup>234</sup>

Trump quickly moved to establish an administration more hostile to civil rights than any since that of Woodrow Wilson, nearly a century earlier. He tapped for Attorney General Republican Senator Jefferson Beauregard Sessions III of Alabama whose record on race was so bad that the Senate rejected him as a federal judge in the mid-1980’s and who, as U.S. Attorney in Alabama, falsely prosecuted civil rights activists for helping elderly black voters cast their ballots.<sup>235</sup> Even more specifically for fair housing purposes, Trump appointed as HUD Secretary Dr. Benjamin Carson, his former rival for the Republican presidential nomination, whose well-deserved renown as a brain surgeon obscured neither his manifest lack of qualifications for the post nor his dearth of knowledge about housing policy.<sup>236</sup> Interestingly, Carson *had* expressed a view on the

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*Id.*

232. See Fareed Zakaria, *Why Donald Trump Could Never Be a Normal Candidate*, WASH. POST (Nov. 3, 2016), [https://www.washingtonpost.com/opinions/why-donald-trump-could-never-be-a-normal-candidate/2016/11/03/68483dd4-a203-11e6-a44d-cc2898cfab06\\_story.html?utm\\_term=.517117ecb315](https://www.washingtonpost.com/opinions/why-donald-trump-could-never-be-a-normal-candidate/2016/11/03/68483dd4-a203-11e6-a44d-cc2898cfab06_story.html?utm_term=.517117ecb315).

233. See Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm\\_term=.423fe8c88e29](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.423fe8c88e29). The Washington Post’s fact-checker awarded Trump’s statement “Four Pinocchios”—its rating reserved for the most egregious lies. *Id.*

234. Jennifer Steinhauer, Jonathan Martin & David M. Herszenhorn, *Paul Ryan Calls Donald Trump’s Attack on Judge ‘Racist,’ But Still Backs Him*, N.Y. TIMES (June 7, 2016), [http://www.nytimes.com/2016/06/08/us/politics/paul-ryan-donald-trump-gonzalo-curiel.html?\\_r=0](http://www.nytimes.com/2016/06/08/us/politics/paul-ryan-donald-trump-gonzalo-curiel.html?_r=0).

235. See Ari Berman, *Jeff Sessions, Trump’s Pick for Attorney General, Is a Fierce Opponent of Civil Rights*, THE NATION, (Nov. 18, 2016) <https://www.thenation.com/article/jeff-sessions-trumps-pick-for-attorney-general-is-a-fierce-opponent-of-civil-rights/>. Berman knows whereof he speaks: he is the author of one of the best accounts of the battle against voter suppression since the passage of the Voting Rights Act. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* (2015).

236. Carson had previously acknowledged through a spokesman that he was unqualified to run a federal agency. See Evan Halper, *Ben Carson Made It*

“Affirmatively Furthering Fair Housing” rule, stating inaccurately that it represents a “mandated social engineering scheme”<sup>237</sup>—a view that reflects the at times hysterical hostility to the relatively toothless rule in some sectors of the American Right.<sup>238</sup>

The foregoing indicates that not only AFFH regulations, but very probably all fair housing enforcement, figure to be one of the first casualties of the Trump Administration. Yet barring an outright repeal of the statute, the considerations set forth in this Article remain very much alive. As long as *Inclusive Communities Project* persists as the law of the land, it remains available for private litigants. Moreover, since the Fair Housing Act allows for state administrative enforcement of the FHA in place of HUD as long as

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*Clear He Was Too Inexperienced for a Cabinet Job. Now Trump Says He's Considering Carson For One*, L.A. TIMES (Nov. 22, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-after-ben-carson-declared-himself-unfit-1479836816-htmlstory.html>. California Democratic Congressman Ted Lieu summed up the situation well:

Remember the famous commercial where a man is flying a helicopter and reveals he's not a pilot but he did “stay at a Holiday Inn Express last night.” Trump's nomination of Dr. Ben Carson to lead HUD reminds me of that commercial. “Do you have any experience running a large federal agency or knowledge of housing and urban development?” “No, but I stayed at a Holiday Inn Express last night.”

*See* Press Release, Ted Lieu, Rep. Lieu Statement on Nomination of Dr. Ben Carson for Secretary of Housing and Urban Development, (Dec. 5, 2016) (on file at <https://lieu.house.gov/media-center/press-releases/rep-lieu-statement-nomination-dr-ben-carson-secretary-housing-and-urban>). *See also* Nick Timiraos and Damian Paletta, *Donald Trump Picks Ben Carson to Head Housing Agency*, WALL STREET J. (Dec. 5, 2016), <https://www.wsj.com/articles/trump-to-nominate-ben-carson-as-housing-secretary-transition-team-says-1480937161> (describing appointment as, “a move that would place a former political adversary with little housing-policy expertise in a key administration post” and writing that “Mr. Carson's selection alarmed [experts] because he lacks any professional experience on issues he will confront.”).

237. Ben S. Carson, *Experimenting With Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://m.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/>.

238. For an example of such fact-free hysteria, see Stanley Kurtz, *Attention America's Suburbs: You Have Just Been Annexed*, NAT'L REV.: THE CORNER (July 20, 2015, 10:01 AM), <http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz>.

the state scheme is at least as strong as the federal framework,<sup>239</sup> disparate impact will endure in such states still committed to basic notions of civil rights. Moreover, several states maintain their own organic fair housing acts with language similar to that of the federal version.<sup>240</sup> With the Federal Government seemingly set to abandon the very notion of fair housing, states can and must fill the breach. States can do so by adopting a disparate-impact framework set forth in *Inclusive Communities Project* and its interpretation here.

One can only hope that someday soon, the Federal Government will embrace its role in leading the fight for civil rights instead of squashing them. In the meantime, the fight endures and hopefully this Article will assist not only in that endurance, but in a forthcoming Reconstruction.

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239. 42 U.S.C. § 3610(f) (2012) reads, in relevant part:

Referral for State or Local Proceedings. —

(1) Whenever a complaint alleges a discriminatory housing practice—

(A) within the jurisdiction of a State or local public agency; and  
(B) as to which such agency has been certified by the Secretary under this subsection; the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint. . . .

(3)

(A) The Secretary may certify an agency under this subsection only if the Secretary determines that—

- (i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;
- (ii) the procedures followed by such agency;
- (iii) the remedies available to such agency; and
- (iv) the availability of judicial review of such agency's action; are substantially equivalent to those created by and under this title.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

240. For a variety of States that have incorporated standards like the FHA into their state codes, see California Fair Employment and Housing Act, CAL. GOVT. CODE §§ 12900–12996 et. seq., (West 2016) (especially at §§ 12955–12956.2 §§ 12980–12989.3); New York State Human Rights Law, N.Y. EXEC. LAW §§ 290, 296 (McKinney 2016); Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/3–101 (West 2016); Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS. §§ 37.2501–37.2507 (West 2015); N.C. GEN. STAT. ANN. § 41A-1 (West 2016).