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# In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act

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ABSTRACT

*Twice in the past three years, the Supreme Court has granted certiorari in Fair Housing cases, and, each time, under pressure from civil rights leaders who feared that the Supreme Court might narrow current Fair Housing Act jurisprudence, the cases settled just weeks before oral argument. Settlements after the Supreme Court grants certiorari are extremely rare, and, in these cases, the settlements reflect a substantial fear among civil rights advocates that the Supreme Court's recent decisions in cases such as* Shelby County v. Holder *and* Fisher v. University of Texas *are working to dismantle many of the protections of the Civil Rights legislation of the 1960s. The sole issue in both of the recently settled Fair Housing Act cases was whether disparate impact analysis – a type of analysis that some on the Supreme Court may view as requiring racial preferences – is valid under the Fair Housing Act.*

*This Article argues that in order to have a chance at achieving the goal of its sponsors – "to replace the ghettos [with] truly integrated and balanced living patterns," – the Fair Housing Act cannot just take aim at the aberrant individual who intentionally denies a person housing because of his or her race. Instead, the Fair Housing Act must recognize claims based on disparate impact analysis alone. This Article posits that disparate impact analysis*

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*is particularly critical in the context of urban redevelopment decisions because such decisions are often made through a multi-party protracted process, in which a discriminatory intent may be impossible to discern or entirely absent. It is the outcome of large-scale urban redevelopment projects, not individual decisions to rent or sell, that will truly shape racial housing patterns in the twenty-first century.*

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## INTRODUCTION

> *"[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."*[1]

In the past few Supreme Court terms, the Supreme Court has seemed inclined to tighten its grip on anything it deems a "racial preference."[2] In the 2012-2013 term alone, the Supreme Court stripped the Voting Rights Act of its main enforcement mechanism and narrowed its acceptance of affirmative action programs.[3] It appears that the Supreme Court is now hoping to limit the existing interpretation of another pillar of the Civil Rights era – the Fair Housing Act.

Twice in the past three years, the Supreme Court has granted certiorari in Fair Housing cases, and, each time, under pressure from civil rights leaders who feared that the Supreme Court might narrow current Fair Housing Act jurisprudence, the cases settled weeks before oral argument.[4] The sole issue in both of these cases was whether disparate impact analysis – a type of anal-

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1. United States v. City of Black Jack, Mo., 508 F.2d 1179, 1185 (8th Cir. 1974) (citing Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967)).

2. *See, e.g.*, Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013); Ricci v. DeStefano, 557 U.S. 557 (2009).

3. *Shelby Cnty.*, *Ala.*, 133 S. Ct. at 2631; *Fisher*, 133 S. Ct. at 2421-22.

4. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, N.J., 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013) *and cert. denied*, 134 S.Ct. 636 (2013); Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011). See Joan Biskupic, *Analysis: Rights Groups Try to Avoid U.S. High Court Setback*, REUTERS (Mar. 2, 2012, 12:23 PM), http://www.reuters.com/article/2012/03/02/us-usa-court-civil-rights-idUSTRE82117X20120302, for information related to the concern among civil rights leaders that the Supreme Court is intent on limiting disparate impact analysis. "Civil rights advocates took extraordinary steps over the last three months to persuade the city of St. Paul, Minn., to withdraw a fair-housing case the U.S. Supreme Court had already agreed to hear, reflecting their expressed fears about the court under Chief Justice John Roberts." *Id.*; *See also* Emily Gurnon, *St. Paul Withdraws U.S. Supreme Court Petition in Housing Discrimination Case*, TWINCITIES.COM (Feb. 10, 2012, 5:33 PM), http://www.twincities.com/ci_19938569; Adam Liptak, *Housing Case Is Settled Before It Goes to Supreme Court*, N.Y. TIMES, Nov. 15, 2013, at A18, *available at* http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html?_r=0; David O'Reilly, *Mount Holly Gardens Discrimination Dispute Settled*, PHILA. INQUIRER (Nov. 15, 2013), http://articles.philly.com/2013-11-15/news/44078231_1_township-residents-olga-pomar-south-jersey-legal-services; Valerie Schneider, *Settlement in Fair Housing Case – A Sigh of Relief*, ACSBLOG (Nov. 14, 2013), http://www.acslaw.org/acsblog/settlement-in-fair-housing-case-a-sigh-of-relief.

ysis that some on the Court may view as requiring racial preferences – is valid under the Fair Housing Act.[5]

This Article argues that preserving disparate impact analysis is critical to ensuring that the Fair Housing Act has a chance to fulfill its missions of decreasing housing segregation, increasing housing opportunities for minorities, and combatting housing discrimination. Furthermore, this Article argues that the *facts* of many modern housing discrimination cases, particularly in the urban redevelopment context, are particularly appropriate for disparate impact analysis. In urban redevelopment cases, racially disparate and segregation-increasing impacts often flow not from a single decision-maker motivated by racial bias (such cases could be addressed by disparate treatment analysis). Instead, redevelopment decisions, such as where to build affordable housing and how neighborhoods might be redeveloped, involve a long term, multilayered and diffuse process in which intent is often not relevant to an inquiry into whether the principles of the Fair Housing Act have been upheld.

The Supreme Court's apparent interest in limiting the use of disparate impact analysis in Fair Housing cases is a recent phenomenon.[6] Since the enactment of the Fair Housing Act forty-five years ago, Fair Housing jurisprudence, which is modeled in large part on employment discrimination jurisprudence, has treated disparate impact analysis as a given – the eleven circuits that have confronted the issue have all assumed or decided that suits based on harms that have a disparate impact on members of a protected class are cognizable under the Fair Housing Act, regardless of whether those perpetrating the harms had a discriminatory intent.[7]

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5. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 382; *Gallagher*, 619 F.3d at 829.

6. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 359-60 (2013).

7. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250-51 (10th Cir. 1995); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, Ohio 782 F.2d 565, 574-75 (6th Cir. 1986); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) [hereinafter *Arlington Heights II*]; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184-85 (8th Cir. 1974); *see also* 2922 Sherman Ave. Tenants' Ass'n. v. Dist. of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006) ("[E]very one of the eleven circuits to have considered the issue has held that the [FHA] . . . prohibits not only intentional housing discrimination, but also housing actions having a disparate impact."). While it is true that the eleven circuits that have confronted a disparate impact challenge have decided or assumed that disparate impact claims are cognizable under the Fair Housing Act, I note that in *Arling-*

This Article seeks to understand the Supreme Court's apparent interest in limiting the use of disparate impact analysis in Fair Housing cases,[8] and it argues that, without disparate impact analysis, there is little hope that the Fair Housing Act will be able to nudge our society in the direction of less segregated living patterns and more housing opportunities for minorities.

Part I of this Article describes the story behind the most recent disparate impact case that made its way to the Supreme Court and was settled just weeks before argument: *Township of Mount Holly v. Mt. Holly Gardens Citizens In Action, Inc*. Additionally, Part I provides historical context regarding passage of the Fair Housing Act and the progression of Fair Housing jurisprudence.

In Part II, this Article confronts textualists who insist that, because the Fair Housing Act does not contain the magic word "affect," it is unconcerned with acts that disproportionately burden members of protected classes.[9] In this part, I dissect the text of the Fair Housing Act to demonstrate that its language supports disparate impact analysis like its cousins, Title VII of the

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*ton Heights II*, the Seventh Circuit suggested that some finding of intent might be required. 558 F.2d at 1290, 1292. That said, as explained in Part V of this Article, the U.S. Department of Housing and Urban Development ("HUD") recently promulgated a regulation formalizing the burden-shifting approach. Under the rule, the approach is as follows:

> (1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect. (2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant. (3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

24 C.F.R. § 100.500 (2013).

8. As noted elsewhere in this Article, the current Supreme Court has not yet had an opportunity to issue a decision related to disparate impact in the context of a Fair Housing Act case. *See supra* note 4 and accompanying text. In light of the Supreme Court's recent race-related decisions in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), and in light of the fact that the Supreme Court has granted certiorari on such cases twice in the past three terms despite the absence of a circuit split, many advocates and scholars predict that the Supreme Court is likely to limit disparate impact analysis if given the opportunity. At the time of this writing, a petition for certiorari has been granted by the Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which raises the issues of whether disparate impact claims are cognizable under the Fair Housing Act, and, if so, what standards of proof should apply. No. 3:08-CV-0546-D, 2014 WL 2815683, at *2 (N.D. Tex. June 23, 2014).

9. *See infra* Table 1.

Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA") (both of which have been held to support disparate impact claims by the Supreme Court and the first of which was amended to explicitly include such claims).

Part III of this Article turns to scholarship that suggests that the disparate impact theory is simply a way to show intentional discrimination through circumstantial or indirect evidence[10] – e.g. if you cannot prove discriminatory intent by showing that a housing provider made racist comments, maybe discriminatory intent can be inferred by looking at evidence that a policy has a disproportionate impact on minorities.[11] Here I argue that, while evidence of disparate impact can certainly strengthen an intentional discrimination claim, a claim based on unintentional discrimination also can stand on its own under the Fair Housing Act.

Part IV contains the meat of this Article. It examines the manner in which municipalities *actually* make housing-related redevelopment decisions. I posit that, because of the diffuse and non-linear manner in which housing-related decisions are made, particularly in the context of so-called "urban redevelopment" projects, intent to discriminate may never be found (and, indeed, may not exist), even where there is a clear discriminatory impact that undermines the purpose of the Fair Housing Act. For the Fair Housing Act to have a legitimate role in nudging our society closer to equality in housing opportunities across racial lines, redevelopment decisions must be subject to disparate impact analysis.

In the final part of this Article, I examine common concerns about disparate impact jurisprudence and propose some methods for addressing such concerns.

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10. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 706 (2006) (arguing that the development of disparate impact theory in the employment discrimination context had the perverse effect of truncating the development of intentional discrimination jurisprudence).

11. *See Arlington Heights II*, 558 F.2d at 1289-90 (holding that under some circumstances a violation of the FHA can be established by showing discriminatory effect without showing enough discriminatory intent as required in Equal Protection jurisprudence after *Washington v. Davis*, 426 U.S. 229 (1976)); *see generally* Selmi, *supra* note 10, at 702-03, 707. According to *Arlington Heights II*, four factors should be considered when there is not a strong showing of discriminatory intent: (1) the strength in plaintiff's showing of discriminatory effect; (2) evidence of discriminatory intent, "though not enough to satisfy the constitutional standard of *Washington v. Davis*"; (3) the defendant's interest in taking the action that produced the discriminatory impact; (4) whether the plaintiff seeks "to compel the defendant . . . from interfering with individual property owners who wish to provide such housing." 558 F.2d at 1290.

## I. THE STORY BEHIND THE STORY

### *A. Mount Holly, New Jersey*

The human story behind the most recent disparate impact case that settled shortly before the Supreme Court was to hear oral arguments[12] – *Township of Mount Holly v. Mt. Holly Gardens Citizens In Action, Inc*.[13] – highlights the ways in which, in the urban redevelopment context, intent to discriminate may be irrelevant to an inquiry into whether the principles of the Fair Housing Act have been upheld.

The plaintiffs in *Mt. Holly* were former and current residents of Mount Holly Gardens (the "Gardens"), a subdivision in Mount Holly Township, New Jersey (the "Township"), who sued the Township in an effort to block redevelopment plans.[14] Those redevelopment plans called for the complete demolition of all existing homes in the Gardens community in order to make

12. The *Mt. Holly* case is the second of two disparate impact cases for which the Supreme Court has granted certiorari in the past two years. The first of the two cases – *Gallagher v. Magner* – was particularly troubling to proponents of disparate impact claims because it was brought by an unusual and unsympathetic set of plaintiffs in the Fair Housing context: landlords who owned dilapidated housing. 619 F.3d 823, 830 (8th Cir. 2010). In *Gallagher*, sixteen landlords sued the City of St. Paul, claiming that the City's aggressive enforcement of the housing code disproportionately impacted their low-income tenants, most of whom were African American. *Id.* at 831. Per the landlords, the City's enforcement of the housing code would force the landlords to either spend money fixing properties (a cost which would be passed to the mostly minority tenants) or to take properties off the market (making rental housing less available to minority tenants). *See* Plaintiffs-Appellants Brief with Addendum at 21-22, 29-30, Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010) (No. 09-1209). Though the landlords asserted that aggressive enforcement of the housing code would harm their minority tenants, no tenants joined the suit. On appeal, the Eighth Circuit found that the landlords had presented a prima facie case of disparate impact. *Gallagher*, 619 F.3d at 837. Fair Housing groups vigorously opposed the petition for certiorari via *amicus* briefs. *See, e.g.*, Brief Amici Curiae of the Hous. Advocates, Inc. & Buckeye Cmty. Hope Found. in Support of Respondents, Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010) (No. 09-1209). Even Walter Mondale, the Fair Housing Act's principal sponsor, weighed in, worried that a conservative and business-friendly Supreme Court might find that disparate impact claims are not cognizable under the Fair Housing Act, which would, according to Mondale, "de-fang the Fair Housing Act." *See* Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, STAR TRIBUNE (Feb. 10, 2012), http://www.startribune.com/politics/national/139138084.html. Even St. Paul's Mayor, Chris Coleman, who had originally pressed the case, feared that under the facts of *Gallagher*, the Supreme Court might grant a pyrrhic victory for the City that would ultimately weaken the Fair Housing Act. *See* Gurnon, *supra* note 4. Bowing to pressure, the City requested dismissal of its petition in February of 2012. *Id.*

13. 133 S. Ct. 569 (2012).

14. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011).

way for a new residential development, the prices of which would be out of reach for almost all of the Gardens current and former residents – essentially, the planned development would have wiped the one predominantly minority community in the Township off the map, scattering its minority residents to even more segregated communities.[15]

The Gardens was originally constructed in the 1950s to house military families, and it consisted of approximately 325 two-story brick row houses.[16] By the 1970s, the neighborhood suffered from many of the problems associated with underserved and poor communities – population growth stressed the infrastructure of the neighborhood and crime rates rose steadily.[17] In response to these circumstances, some members of the neighborhood came together to address the challenges. In the 1970s, for example, residents formed a nonprofit called "Mt. Holly Citizens in Action" (the named plaintiff in the *Mt. Holly* case), which worked with residents and Township officials to help address problems in the community.[18] Additionally, in the 1990s, community activists worked to revitalize the Gardens by rehabilitating properties and advocating for increased social services.[19] These efforts resulted in the renovation of ten homes and the establishment of a community-policing center.[20]

Despite the improvements, the infrastructure in the community continued to fail while the crime rate ticked upwards. The Township commissioned a study in 2002 to determine whether the Gardens should be designated as a blighted area "in need of redevelopment" pursuant to New Jersey's redevelopment laws.[21] Over the strong opposition of many Gardens residents, "the study concluded that the entire Gardens neighborhood was blighted."[22]

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15. Brief in Opposition for Mt. Holly Gardens Respondents at 8, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2012) (No. 11-1507) ("The court below observed that the Township was purchasing Gardens homes for $32,000 to $49,000 and that '[t]he estimated cost of a new home in the development was between $200,000 and $275,000, well outside the range of affordability for a significant portion of the African-American and Hispanic residents of the Township.'"). The relocation-assistance plan was woefully inadequate and had the effect of displacing Gardens residents from the neighborhood. *Id.* Brief for Mt. Holly Gardens Respondents at 10, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2012) (No. 11-1507) ("Given the 'severe shortage of affordable housing' in Burlington County, many Gardens renters reported being unable to find affordable housing elsewhere in the Township . . . [a]nd more than two-thirds of renters who accepted Township assistance were relocated out of the Township.").

16. Brief in Opposition for Mt. Holly Gardens Respondents, *supra* note 15, at 3.

17. *Id.* at 3-5 (noting the fact that the community suffered from severe drainage problems due to residents paving backyards as parking in the area became more scarce).

18. *Id.* at 4.

19. *Id.*

20. *Id.*

21. *Id.* (internal quotation marks omitted).

22. *Id.* at 5.

The Township adopted a redevelopment plan in 2003, which was amended in 2005 and 2008.[23] The 2008 plan called for the construction of up to 520 townhomes and apartments, of which only fifty-six would be designated as "affordable housing," and of those fifty-six, only eleven would be offered to existing Gardens residents on a priority basis.[24] Unfortunately, for almost all of the residents of the Gardens, even the most "affordable" homes in the new development would be out of reach – few, if any, members of the existing community would be able to stay in their homes and benefit from the revitalization of the neighborhood.[25]

With a redevelopment plan in place, the Township began to dismantle the Gardens community. Starting in 2002, the Township started to purchase homes in the Gardens at prices ranging from $32,000 to $49,000 – a price that would do little to allow residents to relocate within Mount Holly or any non-segregated nearby areas.[26] Despite this, sensing that the Township might exercise eminent domain rights if they did not acquiesce, many residents and landlords took the deals offered to them and fled.[27] Unable to afford homes nearby with the money offered by the Township, most former residents moved from the relatively diverse Township to much more segregated communities.[28] As a result, the Township became increasingly white, making already segregated communities even more segregated.[29]

Within a few years, more than 200 homes were purchased by the Township and destroyed.[30] Many of the homes that were demolished were attached to ones where residents remained, leaving broken bricks, gaps, and leakage and drainage problems for the residents who wished to stay in their homes.[31] As of June, 2011, of the 325 original brick row houses, only seventy homes remained under private ownership.[32]

Explaining why she did not wish to leave the Gardens neighborhood, one of the few remaining residents said, "When I bought the house, I thought I'd be here for the rest of my days."[33] Another resident remarked, "My children are here. My roots are here. My grandkids live around the neighborhood. I don't want to go nowhere. I want to stay in Mount Holly."[34] The

23. *Id.*
24. *Id.* at 6.
25. *Id.*
26. *Id.* at 8.
27. *Id.* at 7.
28. *See id.* at 3.
29. *See id.*
30. *Id.* at 9.
31. *Id.* at 6-7.
32. *Id.* at 8.
33. Inst. for Justice, *Scorched Earth: Eminent Domain Abuse in the Gardens of Mount Holly*, YOUTUBE (Mar. 10, 2011), http://www.youtube.com/watch?v=QMDnCcSUfao.
34. *Id.*

few remaining residents live among empty lots, destroyed homes, and damaged infrastructure.

As noted above, the Gardens was the only neighborhood in the Township with predominantly African American and Hispanic residents.[35] Among the 1,301 residents of the Gardens, "46.1% were African-American, 28.8% were Hispanic, and 19.7% were non-Hispanic whites."[36] The Township's plan to destroy the Gardens and replace it with housing that was out of reach to its current residents meant that almost all of the Township's minority residents would have to move to other municipalities.[37] If the redevelopment plan were enacted, the Township would likely become significantly more white, and the individuals who once lived in the relatively integrated Township (when looking at it as a whole) would likely be forced into more segregated areas.[38] This is exactly the problem that the sponsors of the Fair Housing Act sought to remedy – of course, the sponsors of the act were concerned with acts of intentional discrimination, but, as then Senator Walter Mondale explained, the thrust of the Fair Housing Act was also aimed at replacing the ghettos with "truly integrated and balanced living patterns."[39]

### *B. History of Residential Segregation*

In order to understand why disparate impact analysis is needed to combat racial segregation, it is important to understand the forces that lead to the types of racial segregation that are now pervasive in American cities and towns.

When standing at a subway stop at rush hour in many American cities, it is often easy to determine the destination of the train by the race of those who board or disembark. If one sees a white crowd boarding a redline train in Boston, Massachusetts, for example, one can guess that the train is heading north to Cambridge, a neighboring city that is majority white.[40] If the crowd consists mostly of African Americans and other minorities, one may guess that the train is heading south towards Dorchester, a predominantly minority section of Boston.[41] Similarly, if one boards a yellow line train in Washington, D.C., one might be able to guess from the racial mix of the occupants whether the train is heading towards Prince Georges County (a predominately

35. *See* Brief in Opposition for Mt. Holly Gardens Respondents, *supra* note 15, at 3; *see also supra* note 15 and accompanying text.

36. Brief in Opposition for Mt. Holly Gardens Respondents, *supra* note 15, at 3.

37. *Id.*

38. *Id.*

39. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

40. *See Demographics and Statistics FAQ*, CITY OF CAMBRIDGE CMTY. DEV. DEP'T, http://www.cambridgema.gov/cdd/factsandmaps/demographicfaq.aspx (last visited June 23, 2014).

41. *See Dorchester Census Breakdown*, BOSTON.COM, http://www.boston.com/yourtown/boston/dorchester/news/census_2010/ (last visited June 23, 2013).

African American county in Maryland) or towards Arlington (a predominantly white county in Virginia).[42]

The segregation pervasive in modern American cities is not just the result of economic disparities between races (as some assume); segregation also stems from systematic public and private efforts to isolate racial minorities.[43] Though many urban neighborhoods were relatively racially integrated in the early part of the twentieth century, by the end of the 1920s whites began to utilize a variety of legal tools to exclude African Americans from white neighborhoods.[44] Restrictive covenants in deeds prohibited whites from selling their homes to African Americans.[45] Discriminatory zoning practices locked African Americans out of particular neighborhoods.[46] Discrimination in sales, rental, and financing practices was widespread, and there were few legal tools for challenging such practices.[47]

In the 1930s, these tools of segregation, which had been practiced mostly on a local or individual level, began to be more strongly reinforced by federal policies that embraced racial discrimination in federally assisted housing.[48] The housing policies of the New Deal "brought the full force of the federal government to the aid of institutionalized racial segregation."[49] The Federal Housing Administration, with its new program of guaranteed mortgages, adopted policies that promoted, and indeed called for, racial discrimination.[50] For example, the Federal Housing Administration's guidelines for mortgage appraisals called for protection of neighborhoods from the "infiltration of inharmonious racial groups."[51] Additionally, an agency manual explained that neighborhood stability was an important factor to consider in underwriting policies, indicating that "[a] change in social or racial occupan-

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42. *See* Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act As an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1617-18 (2007) ("A typical commuter will always know which train will be next to arrive on [the Metro] platform by the clear racial makeup of those who are waiting – black professionals will be the overwhelming majority if the Green Line is about to arrive, and white professionals will dominate the platform if the Yellow Line is next.").

43. *See id.* at 1620 n.12, 1631.

44. *Id.* at 1620 n.12.

45. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2:2 (2012); *cf.* Shelley v. Kraemer, 334 U.S. 1, 21-22 (1948) (holding that racially restrictive covenants are unconstitutional).

46. SCHWEMM, *supra* note 45, at § 2:2.

47. *Id.*

48. *Id.*

49. Karl Taeuber, *The Contemporary Context of Housing Discrimination,* 6 YALE L. & POL'Y REV. 339, 341 (1988).

50. *Id.*

51. *Id.* (quoting U.S. FED. HOUS. ADMIN., UNDERWRITERS MANUAL 935 (1938)) (internal quotation marks omitted).

cy generally contributes to instability and a decline in values."[52] As homeownership became the principal way for Americans to build wealth, the Federal Housing Administration systematically worked to deny this opportunity to African Americans, resulting in a lasting wealth gap between African Americans and whites, which persists today.[53]

It was not just the federal government that systematically worked to increase segregation in urban environments; the real estate industry wholeheartedly endorsed the federal government's views on racial segregation. Until 1950, for example, the Code of Ethics of the National Association of Real Estate Boards specifically enjoined its members from introducing "members of any race or nationality" into a neighborhood if such persons "will clearly be detrimental to property values."[54] Even when edited in response to pressure from civil rights leaders, the language was changed to thinly veil the clearly discriminatory intent – the post-1950 provision read, "a Realtor should not be instrumental in introducing into a neighborhood a character or use which will clearly be detrimental to property values in that neighborhood."[55] The words "race" and "nationality" were replaced with "character" and "use," but the purpose of the provision was clear.

During the 1940s, 1950s and 1960s, the reach of public and private segregationist policies became even broader. Federally subsidized highway construction and urban renewal programs often reduced the supply of low-cost housing, fragmented neighborhoods, and reinforced the segregated housing patterns.[56] "Blockbusting" – a practice by which real estate agents facilitated white flight from neighborhoods by creating a scare that African Americans were moving into the neighborhood – became widespread.[57] Banks increased the pace of racial isolation by "redlining" African American neighborhoods, refusing to lend (or offering much higher interest rates) in African American

52. John O. Calmor, *Spatial Equality and the* Kerner Commission Report*: A Back-to-The-Future Essay*, 71 N.C. L. REV. 1487, 1511 (1993) (quoting CITIZENS' COMMISSION ON CIVIL RIGHTS, A DECENT HOME: A REPORT ON THE CONTINUING FAILURE OF THE FEDERAL GOVERNMENT TO PROVIDE EQUAL HOUSING OPPORTUNITY 81-82 (1983)) (emphasis omitted) (internal quotation marks omitted).

53. Brian Gilmore, *Home Is Where the Hatred Is: A Proposal for a Federal Housing Administration Truth and Reconciliation Commission*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 249, 252-53 (2011).

54. CODE OF ETHICS OF THE NAT'L ASS'N OF REAL ESTATE BDS, Part III, art. 34 (1924); Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 810 n.14 (1976).

55. CODE OF ETHICS OF THE NAT'L ASS'N OF REAL ESTATE BDS., Part III, art. 34 (1950). In 1950, the former Part II, Article 34 became Part I, Article 5 of the Code of Ethics of the National Association of Real Estate Boards.

56. Taeuber, *supra* note 49, at 342.

57. SCHWEMM, *supra* note 45, at § 2:2 (citations omitted) (internal quotation marks omitted).

communities.[58] In fact, from 1960 to 1970, "every geographic region in America experienced an increase in residential segregation by race."[59]

To understand why disparate impact analysis is needed in the urban redevelopment context, it is necessary to understand that the current conditions in most urban areas are not the result of natural migrations of communities or individual choice; the conditions are a direct result of widespread private and public policies with the explicit intent to segregate communities by race. As explained in greater detail below, the harms created by such longstanding intentional segregation cannot be undone without now taking into account the potential racial implications of redevelopment decisions.

### 1. Enactment of the Fair Housing Act

In order to understand why disparate impact analysis is in line with the purposes of the Fair Housing Act, it is important to examine the context into which the Fair Housing Act was born.

The Fair Housing Act came late in the story of housing segregation – after the core civil rights acts of 1964 and 1965, after the start of the urban unrest of the mid 1960s, and after a National Advisory Commission on Civil Disorders warned that the nation was becoming two societies, separate and unequal.[60]

From the early 1960s, organizations such as the National Association for the Advancement of Colored People ("NAACP") and the National Committee Against Discrimination initiated efforts to push a housing-related civil rights bill through Congress with no success.[61] As African American soldiers returned from Vietnam and were forced into segregated veterans' homes or were unable to find housing due to discrimination, the media – including traditionally white media outlets – began to focus on unrest related to housing.[62] At the same time, provoked by profound discrimination, isolation, and frustration, protests and violence broke out in African American urban areas throughout the country, most notably starting with the Watts Riots in 1965, the Division Street Riots in 1966, and the Newark Riots in 1967.[63]

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58. Taeuber, *supra* note 49, at 341-42.

59. SCHWEMM, *supra* note 45 (citing SCOTT MCKINNEY & ANN B. SCHNARE, URBAN INSTITUTE PROJECT REPORT NO. 3727: TRENDS IN RESIDENTIAL SEGREGATION BY RACE: 1960-1980, at 13 (1986)).

60. Taeuber, *supra* note 49, at 342 (citing NAT'L ADVISORY COMM'N OF CIVIL DISORDERS, REPORT OF THE U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS (1968)).

61. *See* Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 850 n.46 (2005).

62. *See, e.g.*, *Pentagon Seeks to End Off-Post Housing Bias*, KENTUCKY NEW ERA, Aug. 18, 1967, at 1, *available at* http://news.google.com/newspapers?nid=266&dat=19670809&id=O-orAAAAIBAJ&sjid=YWcFAAAAIBAJ&pg=4805,3540598.

63. NAT'L ADVISORY COMM'N OF CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1, 25 (1968) [hereinafter CIVIL

As riots and protests intensified in the late 1960s, President Lyndon Johnson appointed Illinois Governor Otto Kerner, Jr. to head a commission charged with developing a report on civil unrest in urban areas.[64] The commission's report, dubbed the "Kerner Report," concluded that urban civil unrest in African American communities was caused in large part by white racism – not a surprising conclusion in hindsight, but at the time the report's conclusions were revolutionary.[65] The Kerner Report indicated that America was "moving towards two societies, one black and one white – separate and unequal."[66] The report recommended, among other things, the elimination of barriers to choice in housing and the passage of a national and enforceable "open housing law."[67]

The Kerner Report was released on March 1, 1968, as the Senate was in the midst of a filibuster blocking Fair Housing legislation cosponsored by Senators Walter Mondale and Edward Brooke III (who was, at the time, the only African American member of the Senate).[68] With the release of the Kerner Report, and with the help of Republican Everett Dirksen, Mondale and Brooke were able to attain a two-thirds Senate vote for cloture of debate. The legislation was subsequently passed by the Senate on March 11, 1968.[69]

Dr. Martin Luther King Jr.'s assassination on April 4, 1968, served as a catalyst for the bill's quick passage through the House with its essential provisions intact.[70] On April 10, 1968, the House voted 250-172 to accept the Senate's version, and the next day, April 11, 1968, President Johnson signed the bill into law.[71]

The Fair Housing Act made it illegal to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex . . . or national origin."[72] It also made it illegal to "discriminate against any person in the terms, conditions or privileges of sale or rental" because of that per-

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DISORDERS REPORT], *available at* http://www.eisenhowerfoundation.org/docs/kerner.pdf.

64. *See generally id.*

65. *See id.* at 25.

66. *Id.* at 1; *see also* SCHWEMM, *supra* note 45, at § 5:2 n.12 (citations omitted).

67. CIVIL DISORDERS REPORT, *supra* note 63, at 24.

68. Larkin, *supra* note 42, at 1623.

69. SCHWEMM, *supra* note 45, at § 5:2 (citing 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968)).

70. *Id.*

71. *Id.* Title VIII of the Civil Rights Act of 1968 is commonly referred to, and will be referred to herein, as the "Fair Housing Act."

72. Pub L. No. 90-284, 82 Stat. 83 (codified as amended at 42 U.S.C. § 3604 (2012)). Amendments in 1988 added familial status and handicap status as protected classes. *See* Scott N. Gilbert, *You Can Move in but You Can't Stay: To Protect Occupancy Rights After Halprin, the Fair Housing Act Needs To Be Amended To Prohibit Post-Acquisition Discrimination*, 42 J. MARSHALL L. REV. 751, 762-63 (2009).

son's membership in one of the aforementioned protected classes.[73] Additionally, the Fair Housing Act included provisions related to blockbusting, discriminatory advertising, discriminatory lending and other prohibited acts.[74]

### 2. Housing Segregation Now

Despite the Fair Housing Act's broad prohibition against discrimination in housing, forty-five years after the passage of the Fair Housing Act housing patterns in the United States continue to be characterized by high levels of segregation. Demographic trends in the 1970s seemed to suggest that increased racial integration might be on the horizon – African American income levels were rising, the rate of poverty in African American communities was declining, and African Americans "had begun to join the exodus of families from central cities to suburbs."[75] With these trends in mind, and armed with the newly-enacted Fair Housing Act that prohibited discrimination, civil rights leaders were optimistic about increasing residential racial integration.[76]

Despite the fact that the nation seemed poised to enter a more integrated period in the early 1970s, census data shows that from 1970 to 2010 "the overall level of residential segregation between African Americans and whites declined only modestly."[77] By 1980, over one third of African Americans lived in "hyper-segregated" communities, in which they were so isolated that they rarely encountered non-African Americans in any context (i.e. in stores, workplaces, etc.) in their neighborhoods.[78] Housing segregation no longer limited just who people saw in their neighborhoods; it also created an environment in which many African Americans and whites never came into contact in employment, commerce, schools, or many other facets of daily life.[79] This type of hyper-segregation has continued into the twenty-first century, with the 2010 census showing "only modest reductions in residential segregation."[80]

While there may have been hope when the Fair Housing Act was passed that lawsuits addressing individual acts of intentional discrimination would lead to increased integration or housing opportunities for African Americans, the persistent levels of segregation indicate that combatting isolated instances

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73. 42 U.S.C. § 3604 (2012).

74. *Id.*

75. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 60-61 (Harvard Univ. Press 1993).

76. *Id.*

77. SCHWEMM, *supra* note 45, at § 2:2.

78. MASSEY & DENTON, *supra* note 75, at 77 (discussing how no other group in the contemporary United States comes close to this level of isolation). Although Hispanics are considered poor and disadvantaged compared to whites, they do not suffer nearly as much as African Americans from residential isolation. *Id.*

79. *Id.*

80. SCHWEMM, supra note 45, at § 2:1.

of intentional discrimination alone will not lead to a reduction in segregation. As discussed in greater detail in the remainder of this Article, more weapons are needed in the fight to increase housing opportunities for minorities, and among these weapons is the disparate impact theory.

### *C. The Development of Fair Housing Act Jurisprudence*

In order to understand why the Fair Housing Act supports disparate impact claims, as argued in depth in the remaining portions of this Article, it is first important to understand more about the development of case law under the Fair Housing Act, particularly as it relates to disparate impact claims.

The Supreme Court first addressed a disparate impact claim in the civil rights litigation context in *Griggs v. Duke Power Co*., an employment discrimination case brought under Title VII of the Civil Rights Act of 1964.[81] Title VII, passed four years prior to the Fair Housing Act, served as a model for the Fair Housing legislation and is structurally and linguistically similar in many respects.[82]

The *Griggs* case was brought by African American employees, claiming that Duke Power's Dan River plant in Draper, North Carolina utilized employment practices that had a disproportionately negative impact on African Americans and therefore violated Title VII.[83] In the 1950s, Duke Power's Dan River plant had a policy that African Americans were limited to work in its "Labor Department," which constituted the lowest-paying positions in the company.[84] In fact, the highest paid African American employee made less than the lowest paid white employee.[85] In 1955, the company added the requirement of a high school diploma for its higher paying jobs.[86]

After the passage of Title VII in 1964, the company no longer officially restricted African Americans to the Labor Department, but it retained the high school diploma requirement and added the requirement of an IQ test for non-Labor Department jobs.[87] African American applicants were less likely to hold a high school diploma and averaged lower scores on the IQ tests than their white counterparts; thus, they were selected at a much lower rate for these positions compared to white candidates.[88]

The plaintiffs in *Griggs* used statistical evidence to show that the IQ test and high school diploma requirements had a disparate impact on African

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81. 401 U.S. 424 (1971). In her article *A Social Movement History of Title VII Disparate Impact Analysis*, Susan D. Carle notes that the concept of disparate impact analysis predates *Griggs*. 63 FLA. L. REV. 251, 294 (2011).

82. *See infra* Part II.

83. 401 U.S. at 425-26.

84. *Id.* at 426-27.

85. *Id.* at 427.

86. *Id.*

87. *Id.* at 427-28.

88. *See id.* at 430 n.6.

Americans.[89] In North Carolina in 1960, thirty-four percent of white males completed high school, while only twelve percent of African American males did so.[90] Further, fifty-eight percent of whites passed Duke's standardized IQ tests while only six percent of African Americans did so.[91] The plaintiffs also showed that whites who had been promoted prior to the enactment of the requirements and who had neither passed the IQ test nor obtained a high school diploma performed their jobs as well as those who did meet the requirements, meaning that the requirements were a poor measure of job performance.[92]

In its defense, Duke Power argued that its policies were race-neutral and that it lacked any intent to discriminate against African Americans.[93] Indeed, the company argued that its lack of discriminatory intent was evidenced by its offer to fund high school training for non-high school graduates regardless of race.[94] Noting that Title VII prohibits discrimination "because of" race, the company argued that racial discrimination requires an *intent* to treat members of a minority group differently.[95] Without a finding of a racially discriminatory intent, the company asserted, no violation of Title VII could be found.[96]

The Supreme Court held that Duke Power's *intent* or motivation for implementing the IQ test and diploma requirements was not the only relevant issue; instead, the Court indicated that "Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."[97] According to Justice Burger's majority opinion, practices and policies that are "neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[98]

The *Griggs* Court did not hold that employers are without defenses when an employment policy is shown to have a disparate impact on a protected class.[99] Instead, after the plaintiff makes a *prima facie* showing of disparate impact, *Griggs* and its progeny indicate that the burden shifts to the employer to show that it had a nondiscriminatory business justification for its policy or decision.[100] For example, in *Griggs*, the employer may have avoid-

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 431-32.
93. *Id.*
94. *Id.* at 432.
95. *Id.* at 433.
96. *Id.*
97. *Id.* at 432.
98. *Id.* at 430.
99. *Id.* at 432.
100. *Id.* Theoretically, defendants could also simply rebut plaintiffs' prima facie case without also asserting a business justification defense – i.e. defendants could argue that the plaintiff is not part of a protected class or that the evidence plaintiff presented does not show a disparate impact. *See, e.g.*, Steward v. Gwaltney of Smith-

ed liability if it had shown that the IQ test and diploma requirements were appropriate predictors of job performance.[101] Once the employer puts forth a business justification for its practice, the plaintiff has the final burden to show that said justification is unreasonable or is simply a pretext for discrimination.[102]

Just one year after the *Griggs* decision, the Supreme Court issued its first decision under the Fair Housing Act in an intentional discrimination case, not a disparate impact case. That case, *Trafficante v. Metro Life,*[103] is important to discussions of disparate impact analysis for two main reasons. First, in holding that white tenants in an apartment complex who lost the social benefits of living in an integrated community had standing to sue under the Fair Housing Act, the Supreme Court emphasized that the Fair Housing Act is concerned not just with individual acts of discrimination, but also with

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field, Ltd., 954 F. Supp. 1118, 1126 (E.D. Va.) (rejecting plaintiff's vague assertions that employer did not promote minorities), *aff'd per curiam*, 103 F.3d 120 (4th Cir. 1996). In practice, defendants rarely rely on rebutting the prima facie case, and instead, they almost always offer a nondiscriminatory business justification. Accordingly, the court's task in Title VII litigation is usually determining whether the business justification is convincing or whether it is simply a pretext for discrimination. *See, e.g.*, Norman-Nunnery v. Madison Area Technical Coll., 625 F.3d 422, 434 (7th Cir. 2010) (explaining that plaintiff did not present evidence to demonstrate that defendant's legitimate, non-discriminatory reason for not hiring is pretext); United States v. City of N. Y., 637 F. Supp. 2d 77, 79 (E.D.N.Y. 2009) (holding that the New York City Fire Department's use of written examinations to select candidates for admission to the New York City Fire Academy had little relationship to the job of a firefighter); NAACP, Newark Branch v. Town of Harrison, N.J., 749 F. Supp. 1327, 1341-42 (D.N.J. 1990) (holding that the residency requirements do not serve "in a significant way" the Town's legitimate goals to ensure that employees establish loyalty, have knowledge of the community, and can be "readily recalled" in emergency situations), *aff'd sub nom.* Newark Branch, N.A.A.C.P. v. Town of Harrison, 940 F.2d 792 (3d Cir. 1991).

101. *See Griggs*, 401 U.S. at 431-32.

102. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (explaining that if the respondent successfully carried his burden to establish a prima facie case and petitioner successfully rebutted the case, respondent must be afforded the opportunity to show that petitioner's reason for refusing to re-employ was a pretext or was discriminatory in its application on retrial); *see also* United States v. Brennan, 650 F.3d 65, 90 (2d Cir. 2011) (noting that a plaintiff can prove that an employer's asserted justification is pretext for discrimination by showing that there is a reasonable nondiscriminatory alternative to the employment practice, which the defendant failed to utilize).

103. 409 U.S. 205 (1972). In this case, petitioners alleged respondents, owners of a rental property, discriminated against nonwhites on the basis of race in numerous ways, including "making it known to [nonwhite applicants] that they would not be welcome at [the rental community], manipulating the waiting list for apartments, delaying action on [nonwhite applicants'] applications, [and] using discriminatory acceptance standards." *Id.* at 207-08.

the values of integration.[104] Second, the Supreme Court noted that the Fair Housing Act's language is "broad and inclusive"[105] and should be given "generous construction,"[106] two phrases that are important in understanding why every circuit that has faced disparate impact claims has held that such claims are cognizable under the Fair Housing Act.[107]

Three years after the *Griggs* decision, the Eighth Circuit was the first to hear a disparate impact case under the Fair Housing Act – *United States v. City of Black Jack*.[108] In *City of Black Jack*, a municipal zoning ordinance that prohibited construction of any new multifamily dwellings was challenged on the grounds that it would have a disparate impact on minorities, in violation of the Fair Housing Act.[109] At the time, Black Jack, Missouri's demographic makeup was almost completely white, with an African American population between one and two percent.[110] The city of St. Louis, which abutted the city of Black Jack, was approximately forty percent African American.[111] The plaintiffs argued that Black Jack's ordinance prohibiting multifamily housing, while neutral on its face, would serve to preclude African Americans, many of whom were seeking to escape overcrowded conditions in St. Louis by moving into Black Jack.[112]

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104. *See id.* at 212 ("We can give vitality to [§] 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.").

105. *Id.* at 209.

106. *Id.* at 212.

107. *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (explaining that its analysis was "mindful of the Act's stated policy" and "precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision" (quoting *Trafficante*, 409 U.S. at 209, 212)); Graoch Assocs. # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 372 (6th Cir. 2007) (finding persuasive that the broad and remedial purpose of Title VII is parallel with Title VIII as articulated by *Griggs* and *Trafficante*); *see also* Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) ("[T]he FHA must be given a 'generous construction' to carry out a 'policy that Congress considered to be of the highest priority.'" (quoting *Trafficante*, 409 U.S. at 211-12)); Matarese v. Archstone Pentagon City, 795 F. Supp. 2d 402, 430 (E.D. Va. 2011) ("The FHA is 'broad and inclusive in protecting against conduct which interferes with fair housing rights and is subject to generous construction.'" (quoting People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 731 (E.D. Va. 1992))), *aff'd in part and vacated in part sub. nom.* Matarese v. Archstone Cmtys., LLC, 468 F. App'x 283 (4th Cir. 2012).

108. 508 F.2d 1179 (8th Cir. 1974).

109. *Id.* at 1181.

110. *Id.* at 1183; *see also* Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1444 (2012).

111. *City of Black Jack, Mo.*, 508 F.2d at 1183.

112. *See id.* at 1186.

While the facts of the case seemed to support an inference of intentional discrimination,[113] the Eighth Circuit relied on Equal Protection principles and disparate impact-oriented analogies to *Griggs* to hold that the zoning ordinance in question resulted in an impermissible disparate impact on African Americans.[114] The court held that the ordinance in question would "contribute to the perpetuation of segregation in a community which was [ninety-nine] percent white," and therefore that it served to "den[y] persons housing on the basis of race, in violation of 3604(a)."[115]

In 1977, two years after the *City of Jack Black* decision, the Seventh Circuit ruled on a similar exclusionary zoning case in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.[116] In that case, a housing developer sought rezoning of a fifteen-acre parcel of land in the Village of Arlington Heights, a suburb of Chicago, in order to construct a multi-family development.[117] The development was to contain approximately 290 units, ninety of which would be designated for families with low or moderate incomes. Construction of the development would have required the Village of Arlington Heights to change the parcel from a single-family zoning designation to a multi-family zoning designation.[118] The Village of Arlington Heights denied the request, and the developer and other plaintiffs brought a suit alleging violations of the Equal Protection Clause of the Fourteenth Amendment and of the Fair Housing Act.[119]

The trial court in *Arlington Heights* held that the municipality was not motivated by racial animus when it denied the rezoning, but rather by a desire to protect property values.[120] Therefore, the trial court reasoned, there was no violation of any anti-discrimination law.[121]

The Seventh Circuit reversed, finding that the lower court's search into Arlington Height's motivation was not the proper inquiry; instead, it assessed the disparate impact on minorities in light of "its historical context and ultimate effect."[122] Per the 1970 census, the Village of Arlington Heights' popu-

113. *See generally id.* at 1182-83 (explaining that the city ordinance prohibited construction of any new multi-family dwellings and "made present ones nonconforming uses" when the City of Black Jack was "virtually all white").

114. *See id.* at 1184-85, 1188.

115. *Id.* at 1186, 1188.

116. 373 F. Supp. 208 (N.D. Ill. 1974) [hereinafter *Arlington Heights I*], *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

117. *Arlington Heights I*, 429 U.S. at 254.

118. *Id.*; *see also* David L. Callies & Clifford L. Weaver, *The Arlington Heights Case: The Exclusion of Exclusionary Zoning Challenges*, 2 REAL EST. ISSUES, no. 1, 1977, at 22.

119. *Arlington Heights I*, 429 U.S. at 254.

120. 373 F. Supp. at 211.

121. *See id.*

122. *Arlington Heights I*, 517 F.2d 409, 413 (7th Cir. 1975) (quoting Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 436 F.2d 108, 112 (2d Cir. 1970)), *rev'd*, 429 U.S. 252 (1977).

lation was 64,000, only twenty-seven of whom were African American.[123] The Seventh Circuit found that the Village of Arlington Heights had not made "even a small contribution toward eliminating the pervasive problem of segregated housing," and it therefore held that the Village of Arlington Heights' rejection of the rezoning request had "racially discriminatory effects" and could be upheld "only if it were shown that a compelling public interest necessitated the decision."[124] Looking only to Fourteenth Amendment reasoning, the court held that the desire to protect property values was not a "compelling public interest" and therefore refusal to rezone violated the Fourteenth Amendment.[125]

The Supreme Court did not agree with the Seventh Circuit's Fourteenth Amendment reasoning.[126] Relying primarily on its decision in *Washington v. Davis*,[127] decided after the Seventh Circuit ruling but before Supreme Court oral arguments in *Arlington Heights*, the Supreme Court indicated that governmental action would not be held unconstitutional solely because it resulted in a racially disproportionate impact.[128] "Proof of racially discriminatory intent," the Court held, "is required to show a violation of the Equal Protection Clause."[129] Because the Seventh Circuit had only considered the constitutional question and not the Fair Housing question, the Supreme Court remanded the case to the Seventh Circuit to determine whether the disparate impact caused by the Village's denial of the rezoning request violated the Fair Housing Act.[130]

Relying upon the Supreme Court's decision in *Griggs*, upon remand, the Seventh Circuit held that a finding of intent is not a prerequisite to a finding of discrimination under the Fair Housing Act.[131] In short, the Seventh Circuit ruled, in what has become known as "Arlington II," that "at least under some circumstances a violation of [the Fair Housing Act] can be established by a showing of discriminatory effect without a showing of discriminatory intent."[132] The Seventh Circuit developed a four-prong balancing test for determining whether a disparate impact claim should be cognizable under the Fair Housing Act, which has been used in three other circuits.[133]

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123. Callies & Weaver, *supra* note 118, at 23.

124. *Arlington Heights I*, 517 F.2d at 415.

125. *Id.*

126. *Arlington Heights I*, 429 U.S. at 270-71.

127. *Id.* at 265-66 (citing Washington v. Davis, 426 U.S. 229 (1976)).

128. *Id.* at 266.

129. *Id.* at 265.

130. *Id.* at 271.

131. *Arlington Heights II*, 558 F.2d 1283, 1289 (7th Cir. 1977) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-36 (1971)).

132. *Id.* at 1290.

133. *Id.* The Seventh Circuit determined that there were four "critical factors" in determining what circumstances produce a discriminatory impact. *Id.* First, the strength of the plaintiff's showing of discriminatory effect. *Id.* Second, whether there is "some evidence of discriminatory intent," even if "not enough to satisfy the consti-

In the years following the *City of Black Jack* and *Arlington Heights* decisions, nine more circuits confronted disparate impact cases under the Fair Housing Act, and each found disparate impact claims to be cognizable.[134] The circuits developed methods for evaluating disparate impact claims that varied slightly from each other in language and structure, but not in focus (with the exception, perhaps, of the *Arlington II* "four factor test," which may be interpreted to require some showing of intentionality).[135]

Despite over forty years of jurisprudence recognizing the disparate impact theory under the Fair Housing Act, opponents of such recognition have contended, intermittently, that the Fair Housing Act does not support such claims or that such claims require actors to engage in a type of race-conscious thinking that violates the equal protection principles of the Fourteenth Amendment.[136] The call for the end of disparate impact analysis under the Fair Housing Act became more pronounced during the debates about the 1988 amendments to the Act. During the debates, Congress failed to either expressly ratify disparate impact analysis by including it in the amendments

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tutional standard of Washington v. Davis." *Id.* Third, what the defendant's interest is in taking the action which prompted the suit. *Id.* Fourth, whether the plaintiff seeks 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." *Id.*

134. *See* Seicshnaydre, *supra* note 6, at 364-74; *see also* cases cited *supra* note 7.

135. Three slightly different tests have emerged. First, a "'balance-of the factors test' is used in the Fourth, Sixth, Seventh and Tenth Circuits," and was originally proposed in *Arlington Heights II*. Bain, *supra* note 110, at 1446 n.83. It asks courts to weigh the strength of plaintiff's showing of discriminatory effect; evidence of discriminatory intent; defendant's interest in taking action complained of; and, whether plaintiff seeks to compel the defendant to affirmatively provide housing for protected class or to restrain defendant from interfering with individual property owners who wish to provide housing. *Id.* Second, a "'burden-shifting analysis' is used in the Third, Eighth and Ninth Circuits." *Id.* at 1446 n.84. It starts with the plaintiff making a prima facie case of disparate impact by showing that (i) he or she is a member of a protected class and (ii) that the policy, action or decision in question has a significant disparate impact on members of that protected class. *See* United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184 (8th Cir. 1974). The burden then shifts to the defendant to demonstrate that the action in question has a manifest relationship to a non-discriminatory objective and that the policy or decision is necessary to the achievement of this objective (this is similar to the "business necessity" language in Title VII jurisprudence). Bain, *supra* note 110, at 1446 n.84. Even if a defendant is able to meet its justification burden, the plaintiff may still prevail if he or she shows that a viable alternative means is available to achieve the policy objective without a discriminatory effect. *Id.* And finally, a "'hybrid test' is used in the First and Second Circuits." *Id.* at 1446 n.85. It combines the two approaches described above. *See id.*; *see also* Ann B. Lever & Todd Espinosa, *A Tale of Two Fair Housing Disparate-Impact Cases*, 15 J. AFFORDABLE HOUSING & CMTY. DEV. L. 257, 258 (2006).

136. Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2179 (2013).

or to expressly disavow it.[137] When the Supreme Court granted certiorari in disparate impact cases in the 2011-2012 term, and then again in the 2013-2014 term, the conversation about disparate impact theory under the Fair Housing Act in academic and advocacy circles evolved from a simmer to a boil.

## II. DISPARATE IMPACT – STARTING WITH THE TEXT OF THE FAIR HOUSING ACT

With two disparate impact cases in front of the Supreme Court in three years, there has been renewed attention directed at the disparate impact theory, especially in the context of challenges to urban renewal plans that have a disparate impact on minorities. Some advocates have argued that, unlike Title VII and the ADEA, the text of the Fair Housing Act does not support disparate impact claims.[138]

To make this case, opponents of disparate impact analysis point to the fact that, unlike Title VII and the ADEA, the Fair Housing Act does not contain the word "affect."[139] From this, such advocates infer Congress meant for

137. Anti-disparate impact advocates point out that Congress had the opportunity to specifically embrace disparate impact analysis as part of the 1988 amendments and chose not to do so; proponents of disparate impact, of course, make the opposite claim, arguing that, at the time the 1988 amendments were being discussed, Congress was aware that all nine Courts of Appeals that had addressed the issue at that time had found that disparate impact claims were cognizable under the Fair Housing Act. *See* ROBERT G. SCWEMM & SARA K. PRATT, NAT'L FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 3-7 (2009), *available at* http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf. Accordingly, per this argument, Congressional silence regarding disparate impact constituted a tacit approval of the status quo. *Id.* at 4. The Supreme Court, for its part, seems reluctant to infer anything from Congressional silence. *Id.* at 12; *see, e.g.*, Kimbrough v. United States, 552 U.S. 85, 106 (2007) ("Ordinarily, we resist reading congressional intent into congressional inaction."); *cf.* Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 174-75 (2009) (refusing to apply Title VII's mixed motive burden-shifting framework to the ADEA because when Congress considered the two statutes simultaneously in 1991, it amended Title VII to include a mixed motive framework while it did not include such a provision in its amendments to the ADEA.). *Gross*, however, applied to statutes being amended *simultaneously*. 557 U.S. at 174-75. In the case of the Fair Housing Act, Congress simply neglected to amend it at the time it amended Title VII. *See also* SCHWEMM & PRATT, *supra*, at 3-4, 9-13.

138. *See* Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 BANKING L.J. 99, 102-09 (2012); *see* Petitioners' Opening Brief at 17-26, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2013) (No. 11–1507); *see also* Brief for the Petitioners at 20-29, Magner v. Gallagher, 133 S. Ct. 548 (2011) (No. 10-1032).

139. *See* Jenson & Naimon, *supra* note 138, at 108.

Title VII and the ADEA, but not the Fair Housing Act, to govern actions that have discriminatory effects.[140]

Linguistically and structurally, however, the Fair Housing Act mirrors Title VII and the ADEA in many critical ways. A portion of each act follows, with relevant provisions highlighted in bold type:

**Table 1:**

| |
|---|
| **TITLE VII**<br>It shall be an unlawful employment practice for an employer –<br><br>(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or<br>(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 otherwise adversely affect his status as an employee**, because of such individual's race, color, religion, sex, or national origin.[141] |
| **Age Discrimination in Employment Act**<br>It shall be unlawful for an employer –<br><br>(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;<br>(2) to limit, segregate, or classify his employees in any way which would **deprive or tend to deprive** any individual of employment opportunities **or otherwise adversely affect his status as an employee**, because of such individual's age;[142] |
| **FAIR HOUSING ACT**<br>[I]t shall be unlawful –<br><br>(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, **or otherwise make unavailable or deny**, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.<br>(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.[143] |

140. *See id.* at 111-12.
141. 42 U.S.C. § 2000e-2(a)(1)-(2) (2012) (emphasis added).
142. 29 U.S.C. § 623(a)(1)-(2) (2012) (emphasis added).
143. 42 U.S.C. § 3604(a)-(b) (2012) (emphasis added).

Advocates who argue that the disparate impact standard should apply to Title VII and the ADEA claims but not to Fair Housing claims point energetically to the fact that Title VII and the ADEA both contain the word "affect," as shown in bold above (and, indeed, via amendment, Title VII explicitly deals with disparate impact cases).[144] These advocates have myopically focused on the absence of the single word "affect" in the Fair Housing Act without noting the similar or identical language in the key substantive language in each act.[145]

Each act contains language that focuses on the motivations of the actor. Title VII and the ADEA make it illegal to "fail or refuse to hire or to discharge any individual" based on his or her membership in a protected class.[146] Similarly, the Fair Housing Act makes it illegal to "refuse to sell or rent" based on membership in a protected class.[147] This language in all three acts focuses on the motivations of the actor.[148] The question posed by this language is: was the actor's decision animated by the applicant's race, sex, age, national origin, etc.?

In contrast, each act also contains language that focuses on the *impacts* of potentially neutral decisions on protected classes, as opposed to an actor's motivations. In the cases of Title VII and the ADEA, this language appears in subparagraph (2) of the section excerpted above, and it indicates that it is illegal to take actions that would "deprive or tend to deprive" an individual of employment opportunities or "*otherwise adversely affect his status as an employee*" because of membership in a protected class.[149] Similarly, in subparagraph (1) of the language excerpted above, the Fair Housing Act makes it illegal to "*otherwise make unavailable or deny*" a dwelling because of membership in a protected class.[150] Both of these clauses focus not on the motivations of an actor, but instead on the potential discriminatory impacts of such actor's actions. While the "affects" language in Title VII and the ADEA may be more explicit than the "otherwise make unavailable or deny" language in the Fair Housing Act, the "otherwise make unavailable or deny" language, at the very least, can be logically construed to support the notion that the Fair Housing Act is concerned with claims where the effect of the actions, as opposed to the intent of the actor, is central.

Advocates who argue that, without the "adversely affects" language, disparate impact claims simply cannot be cognizable under the Fair Housing Act fail to note that the inclusion of the "adversely affects" phrase simply would not make sense in the housing context – e.g. the language of the Fair

144. *See* Jensen & Naimon, *supra* note 138, at 102-09.

145. *See id.*

146. 29 U.S.C. § 623(a)(1) (2012).

147. 42 U.S.C. § 3604(a) (2012).

148. *See supra* notes 141-143 and accompanying text.

149. 42 U.S.C. § 2000e-2(a)(2) (2012) (emphasis added); 29 U.S.C. § 623(a)(2) (2012) (emphasis added).

150. 42 U.S.C. § 3604(a) (emphasis added).

Housing Act would have been strange indeed if Congress had made it illegal to "adversely affect" an individual's "status" as a potential homeowner or renter.[151] Instead, it is the Fair Housing Act's prohibition against actions that would "otherwise make unavailable or deny" housing opportunities that gives a textual basis for disparate impact claims under the Fair Housing Act.[152] Actions that have a disparate impact on minorities often "make unavailable or deny" housing opportunities because of race, and such actions are prohibited by the language of the Act.[153]

If you think that this debate about the linguistic similarities and differences seems strained, I would have to agree.[154] My argument here is that reading disparate impact analysis into Title VII and the ADEA simply because those statutes contain the word "affect" while the Fair Housing Act omits that word in favor of more descriptive language (i.e. using the "otherwise make unavailable or deny" language) is the most strained reading possible of the acts. Indeed, no court has held that disparate impact claims must be based on the "adversely affect" phrase alone.

As a final note about the text, I turn to the provision that animated many decisions in early disparate impact cases under the Fair Housing Act: the statement of purpose contained at the beginning of the Act. The statement of purpose reads as follows: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[155] Given the remedial purposes of the Fair Housing Act, courts have uniformly held that it is to be "given broad and liberal construction."[156]

## III. DISPARATE IMPACT THEORY IS NOT ONLY ANOTHER WAY TO SHOW INTENT; IT IS A SEPARATE COGNIZABLE THEORY

### *A. Disparate Impact Evidence Used to Prove Intentional Discrimination*

Even those who accept that, as discussed above, the text of the Fair Housing Act allows for disparate impact theory are sometimes confused

151. *See* 29 U.S.C. § 623(a)(2); 42 U.S.C. § 2000e-2(a)(2).

152. *See* 29 U.S.C. § 3604(a).

153. *Id.*

154. I note that many other scholars and advocates have provided a much more in-depth discussion of the text of the Fair Housing Act, Title VII, and the ADEA. *See, e.g.*, Brief in Opposition for Mt. Holly Gardens Respondents, *supra* note 15, at 30-33; Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010). I offer a brief discussion of the text not to provide a full statutory analysis or textualist argument, but simply to show that the text of the Fair Housing Act does not preclude disparate impact analysis.

155. 42 U.S.C. § 3601 (2012).

156. Cabrera v. Jakabovitz, 24 F.3d 372, 388 (2d Cir. 1994) (quoting Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982) (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972))).

about how disparate impact theory comes into play in Fair Housing cases, particularly in the urban redevelopment context.[157] The confusion stems, in part, from the fact that *disparate impact evidence* can be properly used to help prove *disparate treatment claims.*[158] It may help to understand the difference between disparate impact and disparate treatment claims through the lens of a few examples.

Consider a recent case from St. Bernard Parish (the "Parish") in Louisiana. In that lawsuit, litigants claimed, among other things, that the Parish *intended*[159] to restrict African Americans from moving into the Parish after Hurricane Katrina – a classic disparate *treatment* claim.[160] According to the plaintiffs in the case, to accomplish its discriminatory goal of keeping African Americans out, the Parish enacted a series of discriminatory ordinances, including one that restricted property owners in the Parish (who were mostly

157. The Third Circuit criticized the district court decision in *Mt. Holly* for conflating the disparate treatment and disparate impact analyses. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 383 (3d Cir. 2011). At times, however, the Third Circuit fell into the same trap. *Id.* at 385 ("[E]stablishment of a *prima facie* case by itself is not enough to establish liability under the FHA. It simply results in a more searching inquiry into the defendant's motivations . . . ."). Though it got to the right result – that disparate impact claims are cognizable under the Fair Housing Act – the Third Circuit added 'disparate treatment language' into its decision. *See id.* at 385-87. In a disparate impact case, the "more searching inquiry" should not be into the motivations of the defendant, but rather into whether there were less discriminatory alternatives that the defendant failed to take. *See* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1142 (2007) (noting generally that even when purporting to utilize disparate impact theory, courts and litigants often focus on the "state of mind" of decision-makers, blending disparate treatment analysis with disparate impact analysis. "Litigants mix and match disparate treatment and disparate impact allegations, defenses, and burdens of proof like spring sportswear.").

158. *See* Seicshnaydre, *supra* note 157, at 1189-91 ("[T]he possible universe of disparate impact cases includes both those cases in which discriminatory intent is causing the impact and those in which discriminatory intent is having no role in the outcome."); *see also* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 97 (2006).

159. The case involved disparate treatment and disparate impact claims, though, for the purposes of this discussion, I address the disparate treatment claims. *See infra* note 160 and accompanying text.

160. Marlene Theberge, *Fair Housing Center Announces $900,000 Settlement Agreement with St. Bernard Parish; Pleased with Settlement Between United States and Parish*, GREATER NEW ORLEANS FAIR HOUS. ACTION CTR. (May 10, 2013), http://www.gnofairhousing.org/2013/05/10/fair-housing-center-announces-900000-settlement-agreement-with-st-bernard-parish-pleased-with-settlement-between-united-states-and-parish/.

white) to renting only to their own blood relatives.[161] The ordinance was neutral on its face – that is, it treated African American and white property owners identically.[162] But the litigants had strong direct evidence of intentional discrimination, including the fact that Craig Taffaro, the member of the Parish Council who drafted and sponsored the blood-relative ordinance, admitted that the goal of the ordinance was to maintain the demographics, which, at the time of Hurricane Katrina, was 86.4% white.[163] Additionally, Parish Councilpersons voting against the ordinance indicated that the Parish Council's goal was to "block the blacks from living in these areas."[164]

In addition to their *direct* evidence of intentional discrimination, the plaintiffs in the St. Bernard Parish case also had strong *circumstantial* evidence of intentional discrimination, among which was evidence that the ordinance would have a disparate impact on African Americans, who, at the time, were seeking rental housing in the New Orleans area at much greater rates than whites, and who would be largely unable to secure rental housing in the Parish under the blood-relative ordinance.[165] It was clear that the decision-makers were aware of this disparate impact; thus *evidence* of disparate impact was relevant to the disparate treatment *claim*.[166]

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161. The series of actions intended to restrict African Americans from renting within the Parish also included passing an ordinance that required single-family homeowners in residential zones to obtain permits before they could rent their properties, revising the zoning code to greatly reduce the amount of property available for multifamily housing, and perhaps most obviously discriminatory, passing the "blood relative" ordinance mentioned above. *See* Seicshnaydre, *supra* note 157, at 1189-90.

162. *See id.*

163. *See id.* at 1189 n.257; *see also* Sabrina Canfield, *USA Sees Racial Discrimination in New Orleans*, COURTHOUSE NEWS SERV. (Feb. 2, 2012, 9:39 PM), http://www.courthousenews.com/2012/02/02/43566.htm; Editorial, *Time Runs Out for St. Bernard Parish*, N.Y. TIMES (Mar. 29, 2011), http://www.nytimes.com/2011/03/30/opinion/30wed3.html.

164. Seicshnaydre, *supra* note 157, at 1189 n.258.

165. *Id.* at 1189.

166. Some argue that disparate impact theory is primarily a tool for litigants to root out hard-to-prove intentional discrimination. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1231 (1995). Certainly, as explained herein, evidence of a disparate impact can be used to shore up a disparate treatment claim – e.g. evidence that a policy disproportionately impacts minorities and that the decision-makers knew of such the disproportionate impact could lead a fact finder to infer that the decision-maker *intended* the disparate result. But disparate impact claims can and should stand on their own. *See, e.g.*, Seicshnaydre, *supra* note 157, at 1189. See *id.*, for a more detailed analysis of some theorists' argument that disparate impact analysis is simply an "evidentiary dragnet" aimed at catching intentional discrimination that otherwise might be missed.

### *B. Disparate Impact as a Stand-Alone Claim – The Key to Disparate Impact Analysis*

Disparate impact evidence is not just a way to show that an actor had a discriminatory intent when that intent is difficult to prove (though it certainly can be used that way) – the thrust of this Article and the key to the recently-settled *Mt. Holly* case (and, presumably, the next disparate impact case to reach the Supreme Court) is an argument that disparate impact evidence can support independent claims under the Fair Housing Act, even when there was no discernible intent to discriminate.[167] As explained in greater detail in Part IV, the use of disparate impact as a stand-alone claim is, perhaps, most important in urban redevelopment cases, where the intent of municipal actors often has little to do with whether a municipal decision will further segregation or limit housing opportunities for the very communities the Fair Housing Act seeks to protect.

Another example, this time involving a disparate impact claim, might prove useful. Imagine that a municipality seeks to redevelop at least one of its many blighted neighborhoods. To accomplish its redevelopment goal, the municipality plans to purchase or take properties, destroy all existing structures, and rebuild the community as a mixed-income development (much as the municipality did in the *Mt. Holly* case). No matter which blighted neighborhood the municipality chooses, it is likely that many of the current residents will be unable to afford to return to the neighborhood once it is redeveloped. Due to past government-sanctioned discrimination, now-outlawed restrictive covenants, and perhaps some element of personal preference, one of the blighted neighborhoods is mostly African American while another one of the blighted neighborhoods is mostly white. In both of the neighborhoods, the current residents are largely opposed to the plans. The municipality chooses to redevelop, and hence dismantle, the African American neighborhood, not because the decision-makers harbor a racist intent, but because the community meetings on the matter took place in the evenings, at a time when minorities were less able to attend than whites, and, as a result, slightly fewer minorities showed up to object to the redevelopment than their white neighbors.

This is an example of a case that does not involve any intent to discriminate; the municipality made its decision based on a neutral factor – the number of residents voicing opposition to the project – but its effect will be disproportionately born by African Americans, most of who will have to leave the municipality, which will increase racial segregation. Here, evidence of disparate impact would not be used to buttress a claim for intentional discrimination but instead would stand on its own under the Fair Housing Act. If the

167. *Arlington Heights* and its progeny, of course, indicate that intent is one of the factors to be considered, but other jurisdictions and the new HUD rule, *see supra* note 7, indicate that, even without evidence of intent, disparate impact claims must be able to proceed.

Fair Housing Act is to have any chance at succeeding at its drafters' goal of replacing the ghetto with "truly integrated and balanced living patterns,"[168] the mere fact that an action has a disparate impact on a protected class must result in a cognizable claim under the Fair Housing Act.[169] The Fair Housing Act is aimed not just at stopping bad *actors* (i.e. those with the intention to discriminate), but also at preventing bad *acts* (i.e. actions that have a discriminatory effect regardless of intention).

## IV. DISPARATE IMPACT ANALYSIS IS NEEDED TO ENSURE THAT URBAN REDEVELOPMENT DECISIONS DO NOT UNDERMINE THE GOALS OF THE FAIR HOUSING ACT

The underlying *facts* of disparate impact cases in the urban redevelopment context make it plain that these types of cases, even more than the employment discrimination cases to which they are analogized, cry out for disparate impact analysis for three main reasons. First, urban redevelopment decisions, unlike employment decisions, are often made through a diffuse and complicated process where intent is neither relevant to whether discrimination occurred nor possible to discern. Second, widely accepted social science research tells us that much racism occurs with no discriminatory intent at all.[170] Given the protracted manner in which urban redevelopment decisions are made, it is especially possible that unconscious or unintentional bias could influence the outcome. Finally, urban redevelopment decisions are among the main forces shaping our cities right now; the ills of segregation will not be remedied by simply thwarting the actions of individual intentional discriminators.

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168. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968) (statement of Sen. Mondale).

169. Recall that the question before the Supreme Court in *Gallagher* and *Mt. Holly* was simply whether disparate impact claims are cognizable under the Fair Housing Act. *See supra* note 12 and accompanying text. If found cognizable, that certainly does not determine the merits of individual cases – courts will still have to engage in the burden shifting analysis described in *Griggs* and other Title VII and Fair Housing cases (and now formalized in a HUD rule). The question before the Court in *Gallagher* and *Mt. Holly* was simply whether plaintiffs who lose housing opportunities due to an action that has a disparate impact on minorities may walk through the courthouse doors – as explained elsewhere in this Article, such plaintiffs must then shoulder a heavy evidentiary burden. *See infra* Part V.B.

170. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506-07, 532-33 (2003) (discussing the Supreme Court's endorsement of disparate impact theory since 1971); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Destiny Peery, Note, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL'Y 473, 481 (2011).

### *A. Intent Is Not Relevant (and Can Be Impossible to Discern) When Decisions Are Made via a Diffuse Process*

In the employment context (to which Fair Housing Act cases are frequently compared) decisions are often linear and made by individuals acting alone – a supervisor, for example, may institute a policy that disadvantages minorities or a human resources manager may create a test that filters out African American applicants. In these cases, while it may be challenging to prove intent, especially when individuals take pains to mask it, a discriminatory intent can often be found at the root of a discriminatory result.[171] In contrast, decisions related to housing, especially in the urban redevelopment context, are often made by diffuse municipal bodies in which individuals and groups have differing and even conflicting motivations and where a discriminatory intent may not be present, even where a discriminatory result ensues.

Looking more closely at how decisions regarding urban redevelopment are made, it is easy to see how a linear or definable "intent" may be absent in many urban redevelopment or land use decisions. Unlike in the employment context, in the urban redevelopment context, decisions are not made by one individual or entity; instead, decisions are made via a complex democratic process involving many competing constituencies. It is possible that a planning committee may be concerned with traffic, the environmental review board may be concerned with impacts on wildlife, a mayor may be concerned with street safety, and residents may be concerned with density. The process to create a redevelopment plan may take years and involve tens or hundreds of individuals, each with different agendas. But if the result of the decision-making process is a plan that will have a substantial segregating impact or if a project would foreclose housing opportunities to a protected class, the Fair Housing Act should (and, under the precedent in eleven circuits, *does*) require municipalities to consider alternatives that would have a less discriminatory impact.[172]

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171. *See generally* Selmi, *supra* note 10, at 776-81 ("Because subtle discrimination is not fueled by a conscious motive or any express animus, there has been a struggle in the literature to determine whether existing proof structures can accommodate the changed nature of discrimination, and some scholars have proposed new proof structures that typically fuse elements of intent and impact."). As explained in Part III of this Article, disparate impact evidence could be utilized to prove a disparate treatment claim, such as the one described in this example. *See supra* Part III.A.

172. It is important to point out that the issue in *Gallagher* and *Mt. Holly* is not whether every litigant who can show that a municipal decision has a disparate impact on minorities should *win* his or her case; the issue is only whether such cases are cognizable under the Fair Housing Act. *See supra* note 7 and accompanying text. If they are, as eleven circuits have held, then plaintiffs must still show that there was a less discriminatory manner by which the municipality could have accomplished its legitimate goals and that the municipality failed to pursue that less discriminatory alternative. *See infra* Part V.B.

Recent events, such as Hurricane Katrina, display how diffuse decision-making may result in disparate and discriminatory impacts, even when there is no intent to discriminate.[173] As one scholar asks, "Does it matter that no one intended for a disproportionate number of poor persons of color to be left behind when Hurricane Katrina hit? . . . Does it matter that no one intended for those without the resources to leave to be now unable to find the resources to return?"[174] Even if those individuals and entities making decisions have no discriminatory intent at all, shouldn't the Fair Housing Act prevent New Orleans from being reconstructed as a city that is largely unavailable to African American residents? Surely this is the type of situation that the Fair Housing Act should address given that it makes it illegal not just to "discriminate" on the basis of race, but also to "otherwise make unavailable or deny" housing because of race.

Other post-Katrina ordinances further highlight the fact that intent cannot be the only inquiry in Fair Housing matters because of the diffuse and multi-layered manner in which housing-related decisions come into being. Shortly after the storm, the Pointe Coupee Parish, near New Orleans, adopted an ordinance reading: "RESOLVED, That trailer parks of temporary housing for displaced evacuees of Hurricane Katrina and Rita not be created by FEMA in Point Coupee Parish."[175] Perhaps the councilmembers who passed the ordinance were concerned with traffic, aesthetics, or increased enrollment in schools. Perhaps they were retaliating against FEMA, an agency that, after Hurricane Katrina, was viewed largely as ineffective, at best, and intentionally negligent, at worst. Perhaps the intents of the individuals shifted over time, as the ordinance made its way through the democratic process.[176] But regardless of intent, if the council's action served to lock African American residents out of the Pointe Coupee Parish or to increase segregation in the area, surely those residents must be able to pursue a claim under the Fair Housing Act.[177] As one author asks, if it were established "that the majority of those displaced persons . . . in need of . . . housing were persons of color" and that the ordinance would serve to exclude such people from Pointe Cou-

173. As discussed in Part IV of this Article, many municipalities behaved in ways that were intentionally discriminatory after Hurricane Katrina; others, however, passed ordinances and took actions that could not be traced to a discriminatory intent but still had a discriminatory effect. *See supra* Part IV.A.

174. Seicshnaydre, *supra* note 157, at 1188.

175. *Id.* at 1190 n.262.

176. Of course, it is also possible that the ordinance was passed with the intent of excluding minorities.

177. Note that plaintiffs in such a case might not prevail under the Fair Housing Act. As discussed throughout this Article, in most circuits prior to the recent HUD rule, and presumably in all circuits after the HUD rule, disparate impact analysis allows plaintiffs to establish a *prima facie* case, after which defendants have an opportunity to show that the action in question was taken in pursuit of a legitimate objective. The burden then shifts back to the plaintiff to show that there was a less discriminatory alternative, which the plaintiff failed to pursue. *See infra* note 208.

pee Parish, does it matter what went on in the minds of the decision-makers?[178]

Looking at the *Mt. Holly* case – the Fair Housing case granted certiorari by the Supreme Court in the 2012-2013 term – it is easy to see how an intent to discriminate can be divorced from whether a municipal decision has an impact that would undermine the purposes of the Fair Housing Act. As noted above, in that case, the municipality spent a considerable amount of time studying the Gardens neighborhood before declaring it "blighted" and instituting a redevelopment plan that would wipe the existing neighborhood off the map and scatter most of the Township's minority residents to already segregated areas.[179] There is no evidence that any of the many influencers and decision makers had an intent to increase racial isolation or further segregation – no individual councilmember remarked publically on the racial implications of the development plan, no document revealed racial animus, and no paper trail created an inference of discriminatory intent.[180]

Unlike in the employment context (where, as noted above, decisions are usually made through a linear and hierarchical system), no one individual or body was entirely responsible for the multitude of decisions that led to the redevelopment plans in Mount Holly. Presumably, the developer worked with architects, banks, and city planners to devise a redevelopment plan; the planning department, environmental review board, traffic department, and other committees likely weighed in; public input was taken into consideration; the plan was revised numerous times over the course of years, etc. With such a diffuse and protracted process, it could be impossible to ascertain a specific intent to discriminate, and indeed such intent may not exist. But, if the result of such a decision-making process fuels segregation, shouldn't such a claim be cognizable under the Fair Housing Act?

As stated elsewhere in this Article, the question before the Supreme Court in *Gallagher* and *Mt. Holly* was not whether the plaintiffs should *win* on the merits but simply whether they may have their day in court.[181] If disparate impact claims are found to be cognizable under the Fair Housing Act, then courts engage in the burden shifting analysis first outlined in *Griggs* and then followed in most Fair Housing cases.[182] At its core, the burden shifting analysis simply asks courts to determine whether there was another less discriminatory way for the defendant to accomplish its legitimate, non-discriminatory goal. If another path exists for municipalities to accomplish their legitimate non-discriminatory redevelopment goals, which would have a less damaging impact on the communities that the Fair Housing Act intends

178. Seicshnaydre, *supra* note 157, at 1190.

179. Brief for Mt. Holly Gardens Respondents, *supra* note 15, at 8-9.

180. *Id.*

181. *See supra* Part I.A.

182. As previously stated, the majority of circuits utilize a burden-shifting paradigm, while some use a four-factor test. *See supra* note 135 and accompanying text. Presumably, since the codification of the recent HUD rule regarding disparate impact, all circuits will utilize the burden shifting mechanism described therein.

to protect, then, under the current Fair Housing Act jurisprudence, the municipality could be forced to pursue that alternate path. This result seems in line with both the Fair Housing Act and, presumably (assuming that it had no intent to discriminate), the general will of the municipality at issue.

Requiring a showing of intent under the Fair Housing Act (something the Supreme Court seems poised to do) would ignore the basic facts of housing discrimination cases – cases in which, because of the diffuse decision-making process at issue, intent is neither discernible nor relevant to the question of whether discrimination occurred.

### *B. Social Science Tells Us That Intent Is Not a Critical Element of Discrimination*

Requiring proof of discriminatory intent as a prerequisite to a Fair Housing Act claim "ignores much of what [is understood] about how the human mind works."[183] Racial bias, we know from multiple social science studies, is so ingrained in our culture that acting on such bias can rarely be called intentional.[184] Indeed, as one scholar put it, "Insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged . . . creates an imaginary world," which serves to perpetuate discrimination by failing to even acknowledge its presence.[185]

One judge, writing about the increased focus on intent in the employment discrimination context, described the "imaginary world" that a requirement of intent would create as follows:

> It is as if the bench is saying: Discrimination is over. The market is bias-free . . . . The complex phenomenon that is discrimination can be reduced to a simple paradigm of the errant discriminator or the explicitly biased policy, a paradigm that rarely matches the reality of twenty-first-century life.[186]

Another scholar put it this way:

> The urban oppression now experienced by so many blacks is neither natural nor inevitable. In assessing responsibility, little is gained by searching out individual perpetrators. A regime sustains subordination through generating "devices, institutions, and circumstances that im-

183. Lawrence, *supra* note 170, at 323. The author is writing about the Equal Protection Clause and not the Fair Housing Act, yet he suggests that if the symbol has cultural connotations or implications, it can be assumed it is demonstrative of unconscious racist intent. *Id.*

184. *See id.* at 317; Peery, *supra* note 170, at 481; Primus, *supra* note 170, at 532-33.

185. Lawrence, *supra* note 170, at 324-25.

186. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 111-12 (2012) (internal quotation marks omitted).

> pose burdens or constraints on the target group without resort to repeated or individualized discriminatory actions."[187]

Even where there is a single decision-maker (as opposed to the diffuse process described above), social science tells us that discrimination can occur, and indeed more often than not does occur, without intent. Where there are multiple decision-makers, working towards consensus through a lengthy and protracted urban redevelopment process, the likelihood that implicit bias will play a role in the outcome is only increased.

Municipal bodies, such as planning boards, exist to make decisions that impact large groups of people. The conscious intent of the body to, for example, ease traffic congestion in a particular area might be entirely divorced from whether the outcome has a discriminatory impact due to the effects of implicit bias. If municipal leaders, trying to ease traffic congestion in a white neighborhood, decide to construct a highway through the area's only African American neighborhood, it may be entirely possible that the decision-makers had no intent to harm African Americans. At the same time, we know from countless studies that biased results occur even where there is no discriminatory intent.[188] Municipal decision-makers, like all of us, implicitly make judgments on the worth and value of particular people and neighborhoods, and, when those judgments have biased or discriminatory results, the fact that the decision-maker did not *intend* the bias is of no comfort to those impacted.

In the Township of Mount Holly, for example, it is likely that the individuals, from those involved in the decision to declare the Gardens neighborhood "blighted" to those responsible for generating the redevelopment plan, harbored implicit biases, which made them more likely to support the destruction of a minority community (as opposed to a redevelopment plan that would be more likely to increase integration). There is little in the text of the Fair Housing Act or the existing Fair Housing Act jurisprudence to suggest that the Fair Housing Act is meant to distinguish between the type of implicit bias described above and intentional discrimination.

### *C. The Success of the Fair Housing Act Depends on the Survival of Disparate Impact Jurisprudence*

Urban redevelopment decisions are among the main forces shaping our cities and towns, and, as noted above, disparate treatment analysis alone is not sufficient to thwart the segregating effects that sometimes flow from such decisions. If it is to achieve its goal of providing increased and better housing opportunities for members of protected classes, Fair Housing advocates need

187. Calmor, *supra* note 52, at 1508 (quoting Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 828 (1983)).

188. *See* Lawrence, *supra* note 170, at 318; Peery, *supra* note 170, at 481; Primus, *supra* note 170, at 532-33.

a tool that will address the most pressing fair housing concern – the manner in which municipalities engage in development.

Recall that the survival of disparate treatment analysis will not prevent redevelopment of urban areas; instead, it will push municipalities contemplating redevelopment projects to consider whether there might be a path towards their legitimate interest that has a lesser disparate impact on a minority community. Assuming that the decision-makers within the municipality have no discriminatory intent, such a push will generally be in line with the municipality's goals.

## V. RESPONDING TO COMMON CONCERNS

In this section, I respond to some common concerns about disparate impact analysis – e.g. that it requires race-consciousness in a statutory context that seems to promote racial blindness; that municipalities and housing providers will not know how to avoid liability; and that all urban redevelopment decisions will subject municipalities to litigation.

### *A. The Fair Housing Act Allows, and in Some Cases Even Requires, Some Amount of Race-Consciousness*

Critics of disparate impact analysis assert that the Fair Housing Act prohibits decision-making "because of race."[189] Disparate impact analysis, these critics claim, *requires* decision-makers to consider race, and therefore the Fair Housing Act or equal protection principles must forbid such a method of analysis.[190] Indeed, the critics are right – disparate impact analysis does require decision-makers to consider race in some instances. For example, in order to avoid liability under the burden-shifting analysis described above, decision-makers may need to evaluate whether there are means to accomplish their objectives that would have a less discriminatory effect. Municipalities engaged in redevelopment projects, such as the one at issue in the *Mt. Holly* case, might avoid liability by studying the potential impacts of decisions on

189. As noted in Section II, Section 3604 indicates that

> [I]t shall be unlawful –
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race,* color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, *because of race*, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(a)-(b) (2012) (emphasis added).

190. See generally Rosenthal, *supra* note 136 and Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343 (2010), for a discussion of disparate impact analysis and the Equal Protection Clause.

particular racial groups in an effort to determine a path with the least discriminatory outcome.

This type of race-conscious thinking, critics of disparate impact claim, is precisely the type of race-based decision-making that the Fair Housing Act sought to eradicate. It is hard to imagine, however, that the Fair Housing Act is *not* meant to incentivize municipal decision-makers to seek the path with the least discriminatory effect when making decisions about community redevelopment.

Indeed, the Fair Housing Act does not have a single, race-blind purpose.[191] Instead, it appears to have a number of sometimes conflicting objectives. On the one hand, one of its goals is to eradicate segregation, or, as its sponsor Senator Mondale put it, replace the "ghettos" with "truly integrated and balanced living patterns."[192] On the other hand, the Fair Housing Act is clearly also concerned with preventing race from being a factor in housing related decision-making.[193]

Even the language in the "purpose" clause of the Fair Housing Act is, at best, unhelpful in determining whether Congress originally intended the Fair Housing Act to allow for race-conscious thinking. It indicates that its purpose is to provide "for fair housing throughout the United States."[194] What "fair housing" means, and whether race can be taken into account at all in ensuring that it is provided in accordance with the Act, is not made clear.

Courts first grappled with the issue of whether the Fair Housing Act allows for (and perhaps calls for) race-consciousness in two disparate treatment cases in the early 1970s. In the first, *Shannon v. HUD*, the Third Circuit held that the Fair Housing Act's demand in Section 3608 that the Department of Housing and Urban Development ("HUD") act "affirmatively to further" fair housing prohibited HUD from funding a housing project in a minority neighborhood without first considering the impact that the project would have on racial concentration in the area.[195] In that case, the court held that HUD

191. *See* SCHWEMM, *supra* note 45, at § 11:A2 (noting that the Fair Housing Act's dual goals of integration and nondiscrimination are sometimes in conflict with one another).

192. 114 CONG. REC. 3422 (daily ed. Feb. 20, 1968); SCHWEMM, *supra* note 45, at § 2:3.

193. The legislative history of the Fair Housing Act supports the notion that Congress was concerned with both remedying discrimination and alleviating segregation. Addressing the issue of segregation, Senator Mondale, the Fair Housing Act's principal sponsor hoped that the Fair Housing Act would remedy "the alienation of whites and blacks caused by the lack of experience in actually living next to each other." 114 CONG. REC. 2275 (daily ed. Feb. 5, 1968) (internal quotation marks omitted). Similarly, on the House side, Congressman Celler, the Chairman of the Judiciary Committee indicated that the purpose of the Fair Housing Act would be to "eliminate the blight of segregated housing and the pale of the ghetto." 114 CONG. REC. 9559 (1967).

194. 42 U.S.C. § 3601 (2012).

195. 436 F.2d 809, 816, 821 (3d Cir. 1970).

could not ignore the negative effects (or disparate impact) that its decisions might have on minority neighborhoods; according to the court, "Today, such color blindness is impermissible."[196]

In *Otero v. New York City Housing Authority,* issued three years after the *Shannon* decision, the Second Circuit held that a public housing agency could favor white applicants over African Americans for units in a new housing complex if the policy was necessary to maintain integration in the area.[197] In *Otero*, the housing agency was concerned that, if a race-conscious application program was not used, the complex would "tip" and become all black due to white flight.[198] The court held that a race-conscious tenant-selection system could be used if there was "convincing evidence" that a color-blind system would "almost surely lead to eventual destruction of the racial integration that presently exists in the community."[199]

The most famous Fair Housing case involving race-conscious tenant-selection aimed at promoting integration is *United States v. Starrett City Associates.*[200] In that case, the defendants were owners of a huge housing complex in New York that consisted of forty-six high-rise buildings, which housed over 17,000 residents.[201] In order to maintain the complex as an integrated community, the defendants established a tenant selection system with strict quotas by race. Because far more African American and Latinos applied to be residents, the quota system resulted in large numbers of minorities being rejected in favor of white applicants. In a two-to-one decision, the Second Circuit struck down Starrett City's quota system, distinguishing it from the system in *Otero* because *Otero's* system was temporary and related only to the lease-up of apartments while Starrett City's system was ongoing.[202] Race-consciousness is acceptable, the Second Circuit held, as long as it is temporary in nature.[203] Per the court, additional factors to consider would be (1) whether the plan or action is designed to remedy some prior racial discrimination or imbalance and (2) whether the plan seeks to increase opportunities for minorities as opposed to limiting them.[204]

The Fair Housing Act's comfort with some amount of race-consciousness extends beyond tenant-selection programs to other housing-related decisions as well. For example, HUD has promulgated regulations

196. *Id.* at 820.
197. 484 F.2d 1122, 1140 (2d Cir. 1973).
198. *Id.* at 1135.
199. *Id.* at 1136.
200. 840 F.2d 1096, 1098 (2d Cir. 1988).
201. *Id.* at 1103.
202. *Id.* at 1102-03 (citing *Otero*, 484 F.2d at 1126).
203. *Id.* at 1101-03.
204. *Id.* at 1101-02 (internal citations omitted) (explaining that unlike in the affirmative action context, where "measures designed to increase or ensure minority participation, such as 'access' quotas . . . have generally been upheld . . . . [P]rograms designed to maintain integration by limiting minority participation, such as ceiling quotas . . . are of doubtful validity").

requiring participants in federal housing programs to reach out to certain racial and ethnic groups.[205] HUD has also required municipalities utilizing certain federal funds to certify that the municipality is taking measures to "affirmatively further fair housing" and to "aid in the prevention or elimination of slums or blight."[206] In order to ensure that municipalities are properly furthering fair housing goals, HUD requires municipalities to study the impacts of proposed housing programs on racial groups and to formulate responses that promote integration and housing opportunity for members of protected classes.[207] Indeed, in the time since certiorari was granted in the *Mt. Holly* case, HUD has issued two new regulations that explicitly call for race-consciousness in housing decisions. The first explains HUD's approach to disparate impact cases and was promulgated, it seems, in direct response to the question raised in *Gallagher* and *Mt. Holly*.[208] The second, which is still in draft form, provides a structure through which municipalities that receive certain federal funds must study the impact of municipal decision-making on housing opportunities for protected classes.[209]

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205. *See* 24 C.F.R. §§ 200.600-.640 (2013).

206. 42 U.S.C. § 5304(b)(2), (b)(3) (2012).

207. *Id.* at § 5304(a)(2).

208. According to the HUD-issued summary, the rule "formalizes the longstanding interpretation of the Fair Housing Act to include discriminatory effects liability and establishes a uniform standard of liability for facially neutral practices that have a discriminatory effect." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,479 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100). Under the rule, the burden-shifting approach is as follows: (1) the charging party first bears the burden of proving its prima facie case of either disparate impact or perpetuation of segregation; (2) then the burden shifts to the defendant to prove that the challenged practice is necessary to achieve one or more of its legitimate, nondiscriminatory interests; and (3) if the defendant satisfies its burden, the charging party may still establish liability by demonstrating that the "substantial, legitimate, nondiscriminatory interests . . . could be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500 (2013). By requiring the parties to examine whether there is a "less discriminatory" path, the HUD rule requires a certain amount of race-conscious thinking.

209. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710-01 (proposed July 19, 2013). According to the HUD-issued summary of the proposed regulation, the purpose of the regulation is to

> focus[] program participants' analysis on four primary goals: improving integrated living patterns and overcoming historic patterns of segregation; reducing racial and ethnic concentrations of poverty; reducing disparities by race, color, religion, sex, familial status, national origin, or disability in access to community assets such as education, transit access, and employment, as well as exposure to environmental health hazards and other stressors that harm a person's quality of life; and responding to disproportionate housing needs by protected class.

U.S. DEPT. OF HOUS. & URBAN DEV., HUD'S NOTICE OF PROPOSED RULEMAKING ON AFFIRMATIVELY FURTHERING FAIR HOUSING (2013), *available at* http://www.huduser.org/portal/affht_pt.html.

Thus, while courts have held that strict quotas that limit housing opportunities for minorities are not permissible, courts and HUD are comfortable with some element of race-consciousness in housing, provided that the race-consciousness furthers the Fair Housing Act's goal of promoting integration or providing increased housing opportunities to members of protected classes.

In summary, the Fair Housing Act's anti-discrimination principles usually control, and those principles only give way and allow a certain amount of race-conscious thinking when to do so would further the Fair Housing Act's integrationist goals or would prevent policies that have an unjustified disparate impact on the groups that the Fair Housing Act seeks to protect.

### *B. Disparate Impact Analysis Is Not Limitless*

The second main critique of the disparate impact theory is that it knows no bounds and that liability will be found wherever there is proof of even the slightest disparate impact based on race.[210]

Disparate impact theory does not call for liability whenever a disparate impact is detected; indeed, a finding of disparate impact is only the first step in the analysis – it is what may allow plaintiffs to get to the courthouse door. But a simple showing of disparate impact alone is not enough to open those courthouse doors. First, plaintiffs must make out a prima facie case by showing that a *particular practice* led or will lead to a racially disparate result. Pointing to the disparate effect itself is not enough; plaintiffs must show that a particular policy or action is responsible for the result.[211] Relatedly, plaintiffs must show causation: that the policy or practice in question *caused* the disparate results.

Additionally, liability will not hold when only minor disparate impacts are found.[212] The statistical evidence used must show that there is a significant disparity in the effects of a particular policy or decision based on race.[213] Courts scrutinize the statistical evidence carefully and require that it show – not just that there was some disparate impact – but that the disparate impact is so severe that to ignore it would be to thwart the purposes of the Fair Housing Act.[214]

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210. Petitioners' Opening Brief, *supra* note 138, at 39-44.

211. *See* Vega v. Am. Home Mortg. Servicing, Inc., No. CV-10-02087-PHX-NVW, 2011 WL 2457398, at *2 (D. Ariz. June 20, 2011) (explaining that if Plaintiff cannot point to any "specific outwardly neutral practices that Defendants took that had a disproportionate impact upon her based on her race" her claim will fail).

212. *See* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 62 (D. Mass. 2002) ("The standard is not just disparate impact, but substantial disparate impact.").

213. *Id.* ("[W]here a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents cannot but work a disparate impact on minorities.").

214. *See* Khalil v. Farash Corp., 452 F. Supp. 2d 203, 210 (W.D.N.Y. 2006) (noting that some "numbers are too small to be of any statistical significance . . ."), *aff'd*,

In addition to placing a heavy burden on the plaintiff, disparate impact analysis under the Fair Housing Act provides defendants with an opportunity to explain the disparate impact away. Similar to the "business justification" rule in Title VII cases, defendants in Fair Housing cases can escape liability if they show that the facially neutral rule or decision which led to the disparate impact is necessary to accomplish a legitimate objective.[215]

Perhaps the most significant limit placed on the disparate impact theory is that the plaintiff has the burden of showing that there was a less discriminatory means to achieve the defendant's objective. The plaintiff cannot simply assert that the result of a policy is discriminatory; he or she must also show that there was another way to achieve the same legitimate policy objective without a disparate impact (or with a significantly less burdensome disparate impact). If that proves to be an impossible feat, the defendant will prevail.

This is no small burden. Indeed, even while recognizing that disparate impact claims are cognizable under the Fair Housing Act, when they get to the merits of cases, at the appellate level most courts have held that plaintiffs have failed to carry the burden of proving that the defendant failed to pursue a less discriminatory alternative. Indeed, on appeal, plaintiffs have received positive decisions in less than twenty percent of the disparate impact claims considered under the Fair Housing Act since its inception.[216]

An examination of cases in which plaintiffs did not prevail in disparate impact claims highlights the high bar for such claims. In *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, for example, plaintiffs sought to thwart plans to replace 758 low income public housing units with a mix of housing that included only eighty low income housing units.[217] The Eighth Circuit acknowledged that the plan would have a disparate impact on African Americans who occupied almost every one of the 758 low income units, but it held that the plaintiffs had not met their burden of presenting a less discriminatory plan that would accomplish all of the defendant's policy objectives.[218] Cases such as these highlight the fact that plaintiffs cannot simply sit back and complain about a disparate impact, no matter how severe; plaintiffs must also point to a realistic and sound solution that the defendant could implement in place of its proposed action.

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277 Fed. App'x 81 (2d Cir. 2008); *see, e.g.*, Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 575-76 (2d Cir. 2003) ("Statistical evidence is . . . normally used in cases involving fair housing disparate impact claims."); Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 121 (2d Cir. 1997) ("The smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it."); Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1379 (2d Cir. 1991) ("[W]here statistics are based on a relatively small number of occurrences, the presence or absence of statistical significance is not a reliable indicator of disparate impact.").

215. *See supra* note 100.

216. Seicshnaydre, *supra* note 6, at 393.

217. 417 F.3d 898, 901 (8th Cir. 2005).

218. *Id.* at 906.

Despite this high bar, critics of disparate impact analysis still bristle at the "less discriminatory means" portion of the burden-shifting test. "Should decision-makers have to waste time studying every possible alternative to make sure that there is no less discriminatory course of action?" they ask. Courts in the majority of circuits and HUD, by virtue of its rule-making authority, have answered "yes."[219] Given the long history of racial discrimination that the Fair Housing Act seeks to remedy and the problems associated with entrenched segregation, courts have held that it is not too much to ask municipalities and housing providers to consider the impacts of their decisions on protected classes and seek the least discriminatory path towards achieving legitimate objectives. In the Third Circuit's decision in *Mt. Holly Gardens Citizens in Action v. Twp. of Mount Holly*, the court noted:

> [t]he Township may be correct that a disparate impact analysis will often allow plaintiffs to make out a *prima facie* case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing. But this is a feature of the FHA's programming, not a bug. The FHA is a broadly remedial statute designed to prevent and remedy invidious discrimination on the basis of race that facilitates its antidiscrimination agenda by encouraging a searching inquiry into the motives behind a contested policy to ensure that it is not improper.[220]

Without disparate impact analysis, municipalities and other decision-makers will have no incentive to consider the impacts proposed actions may have on classes protected under the Fair Housing Act; and without this incentive, there will be little chance that the Fair Housing Act will nudge our society towards more integrated and fair housing patterns. Laws are not just means of determining liability; they are structures that drive behavior. If the Fair Housing Act will have any hope of addressing modern housing segregation, it will be because, when making redevelopment decisions, municipalities will be forced to consider the potential disparate impacts of municipal actions.

### *C. An Additional Limit Proposed*

As discussed above, even while accepting disparate impact theory as cognizable, courts have been explicit in highlighting the fact that disparate

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219. *See* cases cited *supra* note 7. I note that while eleven circuits have held that disparate impact claims are cognizable under the Fair Housing Act, those circuits following the four-factor approach of *Arlington II* may not rely on the "less discriminatory alternative" approach. Presumably, all circuits will now follow the approach outlined in the HUD rule, which does require an inquiry into less discriminatory alternatives.

220. Mt. Holly Gardens Citizens in Action, Inc., v. Twp. of Mount Holly, 658 F.3d 375, 384-85 (3d Cir. 2011) (internal citations omitted).

impact theory is not without bounds – courts have held that the disparate impacts must be severe, that plaintiffs have the burden of showing that there was a less discriminatory means of accomplishing defendants' goals, and that a particular policy caused the disparate impact. In addition to those explicit limitations, courts have often implicitly suggested an additional limitation. Relying on the Fair Housing Act's dual purpose of prohibiting discrimination and ending segregation, courts have held that, in order to be successful, plaintiffs must show that the defendant's actions would either limit housing opportunities for members of a protected class (i.e. "otherwise make unavailable or deny" housing) or increase segregation (or both).[221]

The Fair Housing Act's dual goals of prohibiting discrimination and ending segregation occasionally raise the question of what courts should do when the resolution of a case would put the Fair Housing Act's anti-discrimination goals in conflict with its anti-segregation goals. Put another way, what should a court do when the anti-discrimination principle is in conflict with the "anti-subordination" principle?

Under the anti-discrimination principle, the law should focus on remedying individual harms caused by discriminatory acts.[222] Under the anti-subordination principle, anti-discrimination law should facilitate the types of social change necessary to eliminate group-based inequality.[223] When these principles are in conflict, courts most often abide by the anti-discrimination principle if doing so would serve members of a protected class. For example, in *Starrett City*, when asked to decide whether a quota system that was aimed at maintaining integration was allowable under the Fair Housing Act, the court determined that the quota system had a discriminatory effect on African Americans.[224] As described above, because there were more African Americans on the waiting list for housing in *Starrett City*, the quota system served to exclude African Americans even while it served its integrationist goal.[225]

This seems like the right result. Though the Fair Housing Act's stated purpose to provide "for Fair Housing throughout the United States" is a bit vague, it certainly seems that it would be antithetical to our basic understand-

221. *See* United States v. Starrett City Assocs., 840 F.2d 1096, 1101, 1103 (2d Cir. 1988) ("We hold . . . that Title VIII does not allow appellants to use rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them.").

222. Seicshnaydre, *supra* note 157, at 1183 (describing Professor Samuel R. Bagenstos' work on the two purposes of employment discrimination law identified in legal scholarship).

223. *Id.*

224. *See Starrett*, 840 F.2d at 1103.

225. *Id.* *Starrett* was, in many ways, a disparate treatment case, not a disparate impact case, however, presumably the same analysis could apply in disparate impact cases – if a neutral rule serves to limit housing opportunities for minorities, then such a claim should at least be cognizable under the Fair Housing Act. *See generally id*.

ing of "fairness" if the Act served to disadvantage African Americans in order to support integration.

## CONCLUSION

Housing segregation and lack of housing opportunities for the communities that the Fair Housing Act purports to protect is at the root of many of our country's societal ills, from gaps in educational achievement across color lines, to disparities in employment opportunities. Emphasizing the intent behind individual acts, rather than the "cumulative effects of government and private decisions on historically disadvantaged communities of color, obscures the complex connection between housing segregation and many other societal ills."[226]

Interestingly, the Supreme Court increasingly seems frustrated by confronting the "branches" of racial inequality that grow from the roots of housing segregation – as Justice O'Conner expressed in the affirmative action context in *Grutter v. Bollinger*,[227] and as was recently affirmed in *Fisher v. University of Texas at Austin*,[228] some on the Supreme Court feel that there should be a time limit on remedying our racist past. The Supreme Court seems to have what I term "racial fatigue" – that is, it appears *tired* of litigation related to our racist past, as opposed to what it sees as our race-neutral present. If the Supreme Court wishes to see fewer cases dealing with disparities in education or employment across racial lines, then it must not render the Fair Housing Act – the legislation aimed at remedying the roots of those problems – impotent.

While the debate about whether the Fair Housing Act allows for the type of race-conscious thinking that is called for in disparate impact analysis will likely rage on, when one examines how redevelopment decisions are *actually made*, it becomes clear that a myopic hunt for *intent* may be fruitless. In the complex and diffuse decision-making process that is at the heart of all redevelopment activity, it is the *effects* of such decisions, not the intent behind those decisions, which really matter. As the Supreme Court stated in *Jones v. Mayer Co.,* "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[229]

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226. Brief of Amicus Curiae Empower D.C. in Support of Respondents at 26, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 569 (2013) (No. 11-1507) (citing Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1606-07 (2005)).

227. 539 U.S. 306, 343 (2003) (proposing a 25-year limit on affirmative action policies).

228. 133 S. Ct. 2411 (2013).

229. 392 U.S. 409, 442-43 (1968).