SCHMIDT v. BOSTON HOUSING AUTHORITY: RACIAL CLASSIFICATIONS IN PUBLIC HOUSING

The Fair Housing Act of 1968[1] (FHA) prohibits[2] racially discriminatory housing practices.[3] Judicial interpretation has characterized the Act as establishing a national goal of integrated living patterns.[4] Despite broad construction of the proof[5] and standing[6] components

1. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1976)

2. *Id.* §§ 3604-06. Title VIII proscribes discrimination in the sale, rental and financing of housing as well as in the administration of brokerage services. *Id.* Single family dwellings sold or rented without broker service and units in owner-occupied dwellings housing no more than four families are exempted from the sale and rental provisions of the Act. *Id.* § 3603(b). Although exempt from the FHA, discrimination in such sales or rentals violates the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1976). The Supreme Court has held that the 1968 Act prohibits "*all* racial discrimination, private as well as public, in the sale or rental of property." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968) (emphasis in original).

3. Housing discrimination by the federal government (*see, e.g.*, Hills v. Gautreaux, 425 U.S. 284, 289 (1976)), local governments (*see, e.g.*, Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970)) and private institutions has been common. Recently, there has been a tendency toward racial steering (*See* Note, Havens Realty Corp. v. Coleman: *Extending Standing in Racial Steering Cases To Housing Associations and Testers*, 22 URBAN L. ANN. 107 (1981); Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808 (1976)) and blockbusting (*see* Note, *Blockbusting*, 59 GEO. L.J. 170 (1970)) on the part of real estate brokers. Steering encompasses "any action by a real estate agent which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing." Zuch v. Hussey, 394 F. Supp 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded mem.* 547 F.2d 1168 (6th Cir. 1977). *See also* Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982).

4. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting with approval the statement of Senator Mondale, 114 CONG. REC. 3422 (1968)).

5. A plaintiff need only show discriminatory effect to make out a prima facie claim under Title VIII. *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *See generally* Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199, 238-61 (1978).

6. Standing requirements under the FHA extend its application as broadly as constitutionally permissible. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-12 (1972). In *Trafficante*, the Court allowed white individuals to challenge actions

of the Act, segregated housing still prevails throughout the United States.[7] In an attempt to alleviate the remnants of past discrimination[8] and produce racially balanced communities,[9] many local housing authorities have implemented programs utilizing benign access quotas.[10] The use of racial classification renders these programs sus-

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depriving them of the benefit of interracial association. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), extended the *Trafficante* ruling to include municipal plaintiffs. *Id.* at 109-11.

7. In 1970, 72 percent of American blacks lived in areas where the black population exceeded 50 percent of the total local population. A. SCHNARE, THE PERSISTENCE OF RACIAL SEGREGATION IN HOUSING 9 (1978). *See generally* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION PROFILE OF THE UNITED STATES: 1978 (1979). For a brief discussion of discrimination in the United States see UNITED STATES COMMISSION ON CIVIL RIGHTS, THIRTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 1-13 (1973).

8. *See* N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975), which points out that since the median black income equals only 60% of that received by whites, blacks have had a more limited selection than have whites in the range of affordable housing. This income differential coupled with exclusionary zoning practices has compelled a vast number of blacks to accept less expensive housing available primarily in the central cities. *Id.* at 135.

9. *See, e.g.*, D. FALK & H. FRANKLIN, EQUAL HOUSING OPPORTUNITY: THE UNFINISHED FEDERAL AGENDA (1976); U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT (1979).

10. Benign access quotas that limit the number of blacks who may enter a community have been implemented to prevent resegregation, a phenomenon caused by "white flight." This situation occurs when the proportion of black residents reaches the "tipping point," the point at which white flight accelerates and results in resegregation. *See* Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157-84 (A. Pascal ed. 1972). The term "community" may encompass a single neighborhood or an entire urban area. *See* Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134-37 (2d Cir. 1973). For a discussion of the various definitions of community see generally A. DOWNS, URBAN PROBLEMS AND PROSPECTS 43-48 (1970). To most blacks, an integrated community is approximately 50 percent black, but most whites consider a community integrated if only a few black residents live there. White opposition to black neighbors does not necessarily stem from a hatred of blacks but rather from a desire to remain culturally dominant in a community. *See, e.g.*, A. DOWNS *supra* at 34-37; Farley, Branche & Colasanto, *Barriers to the Racial Integration of Neighborhoods: The Detroit Case*, 441 ANNALS 97 (1979); Taylor, *Housing Neighborhoods, and Race Relations: Recent Survey Evidence*, 441 ANNALS 26, 39 (1979). Due to the high mobility of Americans, the tipping point can be reached without white residents leaving the community at an abnormal rate. *See* Mayer, *Russel Woods: Change Without Conflict*, in STUDIES IN HOUSING AND MINORITY GROUPS, 198 (N. Glazer & D. McEntire eds. 1960). The tipping point is often estimated to occur once a neighborhood becomes approximately 25 to 30 percent black, but the exact proportion depends on the white residents and their fears about the change in character of the community and the decline in property values. These expectations typically become self-fulfilling prophecies. *See* J.

ceptible to constitutional[11] and statutory[12] attack. In *Schmidt v. Boston Housing Authority*,[13] the United States District Court of Massachusetts held that absent a showing of discriminatory effect, the use of benign access quotas does not violate Title VIII of the Civil Rights Act of 1968.[14]

In *Schmidt*, white residents of South Boston brought a class action suit[15] alleging that defendant Boston Housing Authority (BHA) violated Title VIII of the Civil Rights Act of 1968.[16] Plaintiffs claimed the Tenant Selection and Assignment Plan (the Plan) adopted by the BHA[17] deprived them of an opportunity to rent[18] or secure trans-

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HECHT, BECAUSE IT IS RIGHT 34-35 (1970); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30, 34-35 (1960). *But cf.* Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 J. AM. SOC. REV. 425 (1979) (proposing as a hypothesis that economic and environmental deterioration are more important than social factors in white decisions to leave a community). The concept of tipping is the motivating factor behind access quotas which limit the number of minorities into a particular area. Without such programs many experts believe that fair housing programs will do little but change the location of the black ghettos. *See generally* Schelling, *supra*.

11. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 2. For a discussion of decisions applying constitutional scrutiny to benign access quotas, see notes 41-55 and accompanying text *infra*.

12. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976 & Supp. III 1979); Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976); Civil Rights Act of 1968, 42 U.S.C. § 3604 (1976). For a discussion of cases dealing with statutory issues raised by benign access quotas, see notes 54-64 and accompanying text *infra*.

13. 505 F. Supp. 988 (D. Mass. 1981).

14. *Id.* at 997.

15. *Id.* at 990. Four classes of white, life-long residents of South Boston brought suit. Class One consisted of white elderly residents of South Boston who had applied for low income housing; Class Two consisted of white applicants for low income housing who resided in South Boston; Class Three consisted of white BHA tenants who resided in low income housing in South Boston and had applied for transfers to low income housing in that community; and Class Four consisted of leaders of the South Boston community. *Id.*

16. *Id.* at 995. In particular plaintiffs in *Schmidt* asserted BHA violated 42 U.S.C. § 3604(b), (d) (1976). Section 3604(b) makes it unlawful "to discriminate against any person in the sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion or national origin," *Id.* § 3604(b). § 3604(d) makes it unlawful "to represent to any person because of race, color, religion or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." *Id.* § 3604(d).

17. 505 F. Supp at 990. The BHA plan was outlined in a 1977 consent decree entered in a desegregation suit in the Suffolk Superior Court (Perez v. Boston Hous. Auth., Suffolk Sup. Ct. No. 17222). The Plan was submitted to the Department of Housing and Urban Development (HUD) and the Massachusetts Department of Community Affairs (DCA) for approval. The Plan was approved and implemented

fers[19] to low income housing in South Boston.[20] Under the Plan, applicants seeking residence at a BHA development where their race was substantially in the minority received priority status.[21] Since all of the BHA projects in South Boston had a white occupancy of at least 90 percent,[22] plaintiffs did not receive minority status at any of the developments where they desired to live.[23] The *Schmidt* court held that to merit Title VIII relief plaintiffs need only prove facts

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in June, 1978. Essentially, the Plan established a system of priorities for tenant assignment and selection, according priority to those applicants and transfer applicants who chose to be housed at a BHA development in which their race was substantially in the minority. *Id.* at 991-92.

18. *Id.* at 990-91. Classes One and Two claimed they could not obtain units in South Boston public housing due to the Plan. *Id.*

19. *Id.* at 991. Class Three claimed that they could not obtain transfers from the low income projects in which they presently lived to a BHA project in South Boston. *Id.*

20. *Id.* at 992. The plaintiffs could have obtained low income units in other sections of the city. *Id.*

21. *Id.* at 991-92. Section V(B)(5)(c) of the Plan defines a minority preference applicant as follows:

> Any applicant who chooses to be housed at a development in which his/her race (white, black. . . .) is substantially in the minority will be given priority over all other applicants in the first available habitable vacancy . . . except that white applicants will not be eligible for this priority once the percentage of white tenants in a development reaches fifty percent. A racial group is a substantial minority when the percentage of tenants of that race living in one development is less than that racial group's percentage of the total number of people eligible for public housing in the City of Boston. . . .

Id. at 995. Section V(B)(5)(d) provides the definition of minority preference transfer as follows:

> Any tenant in resident at an Authority development in which his/her race is not substantially in the minority will have the right to apply for a transfer to a location at which his/her race is substantially in the minority, and will receive priority over all other transferees and applicants, except for emergency applicants or transferees, for available vacancies at the project chosen. However, white applicants will not be eligible for this priority once the percentage of white tenants in a development reaches fifty percent.

Id. at 995.

22. *Id.*

23. *Id.* at 991. Under the Plan, an applicant for public housing or for transfer within the public housing system must accept a housing offer made by BHA within one week. If the applicant does not timely accept, his or her name is withdrawn from the waiting list. The applicant may then reapply for housing in which case his or her name is placed at the bottom of the waiting list. The minority preference system increases the time on the waiting list for all those applicants who do not choose to be minority preference applicants. All of the housing developments in South Boston are "racially imbalanced," defined by the Plan as less than ten percent non-white. Conse-

showing discriminatory effect of the Plan.[24] In reaching this conclusion, the court ruled that the FHA proscribes subtle[25] as well as blatant[26] forms of discrimination.[27] The *Schmidt* court concluded that if enforcement required proof of intent, many discriminatory actions would continue unchecked.[28] Despite this lenient approach, the court dismissed plaintiffs' action for failure to prove facts showing discriminatory impact.[29]

After three years of consideration, Congress enacted Title VIII of the Civil Rights Act of 1968.[30] The bill's proponents[31] intended Title VIII to produce greater housing choices for all minorities and yield the benefits of integrated living for all of American society.[32] Compelled by the findings of the Kerner Commission,[33] the sponsors[34] of

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quently, the Plan does not give whites the opportunity to act as minority preference applicants at any of the South Boston projects. *Id.* at 992, 995.

24. *Id.* at 994.

25. For example, subtle discrimination such as economic discrimination, embodied in the discretionary placement of low-income areas and restrictive suburban zoning ordinances, exacerbates racial segregation by constricting the availability of low income housing in white areas. *See* J. FEAGIN & C. FEAGIN, DISCRIMINATION AMERICAN STYLE 155 (1978).

26. For an example of blatant housing discrimination, see note 63 *infra*.

27. 505 F. Supp. at 994.

28. *Id.*

29. *Id.* at 996-97. The statistics presented by plaintiffs revealed that non-whites are considered as minority preference applicants for twenty-eight housing developments, and whites are considered as minority preference applicants at twenty-three housing developments. The court held this difference to be legally insignificant, showing no discriminatory impact. *Id.* at 995.

30. *See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 858, 863 (1969); Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 734. *See generally* Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

31. In 1967, the Johnson administration introduced civil rights legislation with fair housing provisions. The bill was reported out of the Senate Judiciary Committee without the housing sections. A housing amendment was added to the bill on the Senate floor. *See* Dubofsky, *supra* note 30, at 152-54.

32. *See* 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale). The Supreme Court acknowledged this proposition in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210, 211 (1972).

33. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) finding that "America is dividing into two societies, black and white, separate and unequal . . . ." *Id.* at 481. For a description of the effect of the Report in the passage of Title VIII, see Dubofsky, *supra* note 30, at 158-59.

34. Senators Mondale and Brooke sponsored the first attempt to pass the Fair

the bill recognized and addressed the need to replace the "blight of segregated housing"[35] with "truly integrated living patterns."[36]

Congress hoped that strict enforcement of Title VIII would end all types of private and governmental discriminatory housing practices.[37] For the purpose of analysis, racial discrimination in public housing administration can be characterized as either overt or covert.[38] Overt discrimination describes a situation that occurs when a regulation, on its face, utilizes race to classify groups of individuals.[39] Covert discrimination, on the other hand, arises when a regulation, containing no classification, produces racially discriminatory results.[40] Recognizing this distinction, federal courts developed different analytical standards depending on whether a court characterized the allegedly discriminatory action as overt or covert.[41]

Since housing regulations rarely contain overt racial classifications,

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Housing amendment, but they withdrew their proposal in favor of a compromise amendment offered by Senator Dirksen. 114 CONG. REC. 980-83 (daily ed. Jan. 26, 1968).

35. 114 CONG. REC. 9559 (1968) (statement of Congressman Celler, Chairman of the Judiciary Committee).

36. *Id.* at 3422 (statement of Senator Mondale).

37. *See* notes 2, 30, 33 and accompanying text *supra*.

38. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See also* notes 39-42 and accompanying text *infra*.

39. *See* Lee v. Washington, 390 U.S. 333 (1968) (per curium approval of a federal court order holding unconstitutional Alabama statutes requiring racial segregation in prisons); Korematsu v. United States, 323 U.S. 214 (1944) (majority sustained a conviction for violating a military order during World War II excluding all persons of Japanese ancestry from designated West Coast areas); Hirabayashi v. United States, 320 U.S. 81 (1943) (unanimously upholding the curfew orders at issue in *Korematsu*); Strauder v. West Virginia, 100 U.S. 303 (1880) (declaring invalid the West Virginia statute barring blacks from jury duty).

40. *See* Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); Washington v. Davis 426 U.S. 229 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

41. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW at 706-20 (10th ed. 1980). Different lines of analysis developed due to the fact that overt racial classifications present presumptive evidence that the government decision maker or decision-making body intended to discriminate on account of race. When there is no racial classification in the regulation, but there is racially disproportionate impact, only an inference of intent arises. Courts become suspicious that lurking below the innocent-looking regulation is an intent to discriminate. Proof of intent is not necessary in the case of overt discrimination while the evidentiary element is the key issue in the covert line of analysis. *Id.*

Title VIII litigation has centered around the covert line of analysis.[42] The primary issue arising in the covert line of cases is whether evidence of purposeful discrimination[43] or mere discriminatory impact[44] establishes a statutory violation. Judicial resolution of this issue determines the outcome of many Title VIII cases because discriminatory intent in housing regulation is very difficult to prove.[45]

The Supreme Court has not addressed the problem of whether courts should apply an intent or effect test in a Title VIII action.[46] Consequently, lower federal courts interpreting Title VIII examine Supreme Court decisions in other civil rights areas for guidance.[47] In *Griggs v. Duke Power Co.*,[48] the Supreme Court unanimously held that defendant's use of a standardized intelligence test violated Title VII of the Civil Rights Act of 1964.[49] The test disqualified black job applicants at a substantially higher rate than white applicants.[50] The

42. *See generally* N. GLAZER, *supra* note 6; J. FEAGIN & C. FEAGIN, DISCRIMINATION AMERICAN STYLE (1978).

43. Purposeful discrimination involves an actual legislative or regulatory decision based on the intent to discriminate on the basis of race. *See generally* Schwemm, *From Washington to Arlington Heights and Beyond: Discriminating Purpose in Equal Protection Litigation*, 1977 ILL. L.F. 961.

44. Discriminatory impact occurs as the natural consequences following an official decision. There is no requisite mental state associated with this form of actionable discrimination. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971). For a general discussion of whether motive should outweigh effect, see Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95, 115-118; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1281-84 (1970); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970).

45. *See* Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974).

46. The Court has decided this issue in the area of Title VII employment discrimination (Griggs v. Duke Power Co., 401 U.S. 424 (1971)), but when faced with the issue in the field of housing the Court remanded to the Seventh Circuit for consideration (Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)) and then denied review of the Circuit Court's decision. Metropolitan Hous. v. Arlington Heights, 558 F.2d 128 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

47. *See* note 48 and accompanying text *infra*. *See generally* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, HARV. C.R.-C.L. L. REV. 128 (1976).

48. 401 U.S. 424 (1971).

49. 42 U.S.C. §§ 2000e-1 to 17 (1970) (as amended by 42 U.S.C. §§ 2000e-1 to -17 (1981 Supp.).

50. 401 U.S. at 429. Duke Power also required a high school diploma for acceptance to a higher paying job. *Id.* The evidence showed 58 percent of the white applicants passed the test while among black applicants only 6 percent passed. In addition,

Court asserted that unless defendant showed that the test results substantially related to job performance,[51] the discriminatory impact alone would render the hiring practice invalid.[52] Choosing not to analyze the specific language of Title VII, the Court based its decision on the larger policy objective of Congress to produce equal employment opportunities.[53] The Court concluded that strict statutory construction would leave subtle forms of discrimination undetected.[54]

If the Supreme Court applied only the *Griggs* impact test in employment discrimination cases, application of the impact test to Title VIII litigation would follow naturally. In *Washington v. Davis*,[55] however, the Court upheld a municipal police department's use of a verbal skills test[56] even though as between black and white recruits a much larger proportion of blacks failed the test.[57] The *Davis* court drew a distinction between plaintiff's equal protection and Title VII claims.[58] The Court stated that plaintiffs must show discriminatory intent to establish the constitutional violation, and that the *Griggs* impact test operates only with respect to the statutory claim.[59]

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only 12 percent of the black males in the state had completed high school while 34 percent of the white males had received a diploma. *Id.* at 430 n.6.

51. *Id.* at 431-32. The Court reasoned that the burden should be placed on the employer because only the employer knows the true reasons for implementing the practice. The employer stands in a better position to show the business rationale behind such decisions. *Id.*

52. *Id.*

53. Id at 432. Plaintiffs' claim was based on § 703(a) of Title VII which makes it unlawful for an employer to discriminate against an individual "because of such individual's race." 42 U.S.C. § 2000e-2(a) (1970) (as amended by 42 U.S.C. §§ 2000e-2a (Supp. 1981). The Court did discuss the intent element that might be inferred from "the because of" language. *See* Schwemm, *Discriminating Effect and the Fair Housing Act*, 54 HARV. L. REV. 199, 214-15 (1978).

54. 401 U.S. at 432.

55. 426 U.S. 229 (1976).

56. Davis v. Washington, 512 F.2d 956, 958 (D.C. Cir. 1975), *rev'd* 426 U.S. 229 (1976). (The examination was used by the District of Columbia Police Department to screen recruits.).

57. 512 F.2d at 958-59. The failure rate of black applicants who took the test was 57 percent as compared to a failure rate of 13 percent for whites. *Id.*

58. 426 U.S. 229 at 239-245; 246-248.

59. *Id.* The true significance of *Davis* for fair housing purposes lies in its conclusion that the same action may be judged by two different standards depending on whether plaintiffs bring a statutory or constitutional claim. The Supreme Court did uphold the police department's test under both tests, so this aspect of the opinion

Prior to *Davis*, several lower federal courts applied the *Griggs* impact test to Title VIII actions.[60] The Eighth Circuit, in *United States v. City of Black Jack*,[61] held that discriminatory impact alone constituted a Fair Housing Act violation.[62] In *Black Jack*, the city tried to block construction of a low income housing project by refusing to rezone.[63] The Court declined to entertain an equal protection claim because the federal government rather than a disappointed, prospective tenant had brought the action.[64] The court cited both constitutional[65] and statutory[66] precedent but finally based its opinion solely

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arguably amounts only to *dicta*. But the Court reviewed the approach a year later in *Arlington Heights*. *See* Gunther, *supra* note 38.

60. *See* Kennedy Park Home Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). In *Kennedy Park*, the Second Circuit held that equal protection and Title VIII standards were essentially the same. The court found the requisite discriminatory impact in the city's attempt to block construction of a low income housing project in an all-white neighborhood. The zoning commission rezoned the proposed site for recreational purposes. The court associated this action with a history of segregation to find that Lackawanna violated the Fair Housing Act. *Id.* at 114. *See generally* Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976) (holding that race is impermissible factor in housing decision under Title VIII); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (applying an effect test to a decision by city to rezone proposed building site); Williams v. Matthews Company, 499 F.2d 819 (8th Cir. 1974) (finding discrimination on the part of a real estate developer who used race as a criteria in building decisions); United Farm Workers of Florida v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) (holding that once a discriminatory effect is shown the burden shifts to the government to show a compelling state interest and the necessary nature of the means); Gautreaux v. City of Chicago Hous. Auth., 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971) (holding that choice of housing sites can not be delayed due to racial hostility). *But cf.* Boyd v. Lefrak Organization, 509 F.2d 1110, 1113 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975), (Second Circuit holding disproportionate impact sufficed as proof in an equal protection claim against a governmental action but drew a distinction between public and private defendants under Title VIII). The conclusion in *Boyd* is unsupported by the language of the statute and directly at odds with the *Davis* decision.

61. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

62. *Id.* at 1184-85.

63. *Id.* at 1185. The City of Black Jack, Missouri, passed a zoning ordinance that prevented the construction of multi-family low income housing units. The city put forth such justifications as controlling traffic, preventing overcrowded schools and maintaining property values. The court found these reasons inadequate to justify the impact felt by minorities in the community. *Id.*

64. *Id.* at 1185. The plaintiff in *Black Jack* brought its claim specifically under 42 U.S.C. § 3604(a) (1976) (as amended by 42 U.S.C. 3604(a) (1980)).

65. 508 F.2d at 1184-85.

66. *Id.*

on Title VIII.[67] *Black Jack* stands as the first appellate decision to sustain a Fair Housing claim exclusively on the basis of discriminatory impact.[68]

The confusion over the appropriate Title VIII standard culminated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[69] In *Arlington Heights*, the Supreme Court reversed the Seventh Circuit's decision[70] that the discriminatory effect test applies in an equal protection claim.[71] Plaintiff brought suit under both Title VIII and the Fourteenth Amendment,[72] claiming that defendant discriminated on the basis of race by refusing to rezone for low income housing.[73] The Court held that the statutory claim should be resolved before the constitutional issue.[74] The Court further stated that, in accordance with *Washington v. Davis*, plaintiffs must show discriminatory intent to establish an equal protection violation.[75] By remanding the case to the circuit court for determination of the Title VIII issue with these instructions,[76] the Court suggested a dichotomy

67. *Id.*

68. This becomes particularly important after the Supreme Court decided *Davis* and *Arlington Heights* because these decisions did not affect the *Black Jack* precedent by their holding that equal protection claims require proof of discriminatory intent. *See* Schwemm, *supra* note 3, at 245-46.

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

70. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

71. *Id.* at 412.

72. *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208 (1974).

73. The City of Arlington Heights refused to rezone an intended building site to permit the construction of low to moderate income housing. Three blacks filed suit seeking declaratory and injunctive relief. The opponents of the rezoning had focused on the possibility of falling property values and the desirability of having this land as a buffer area between residential and commercial districts. 429 U.S. at 258.

74. *Id.* at 271.

75. *Id.* at 266-68. The Court elaborated on *Davis* by stating that a plaintiff need not prove that a challenged action rests solely on racially discriminatory purposes. If there is proof of a discriminatory purpose the burden then shifts to the defendant to show that there were other judicially acceptable reasons for the decision. The Court outlined several evidentiary sources that may be looked to for proof of discriminatory intent. They included the historical background of the decision, the specific sequence of events leading up to the decision, any departures from normal procedure and the legislative background of the decision. *Id.*

76. *Id.* at 272. Justices Marshall, Brennan and White criticized Justice Powell's opinion for the majority because it reached the constitutional issue. In his dissent, Justice White reminded the Court that it is the usual practice when a Court of Ap-

between the statutory and constitutional claims. On remand,[77] the Seventh Circuit decided that a showing of discriminatory effect established a Fair Housing Act violation.[78]

Arlington Heights remains the strongest indication that the Supreme Court would apply the *Griggs* impact test to a Title VIII action.[79] Without further direction, however, courts evaluating covert discrimination must adhere to the two-standard approach left in the wake of *Arlington Heights*. This may produce incongruous results since the same governmental action may comply with the Constitution and violate the Fair Housing Act.[80]

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peals renders a decision before it has the benefit of the Court's opinion on the point (in this instance the Seventh Circuit had made its decision before *Davis* was handed down) to vacate the judgment below and remand allowing the lower court to reconsider in light of the Court's holding. *Id.*

77. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1977).

78. *Id.* at 1290. The Seventh Circuit stated that they had not reached the statutory issue in their prior decision because plaintiffs had not pursued this avenue. The court drew the analogy to Title VII stating that Congress, by enacting § 3601 of Title VIII, intended that the same type of interpretation be given to § 703(h) of Title VII. The District Court also cited Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973), for the proposition that Title VIII should be construed broadly to enable open, integrated housing. 558 F.2d at 1284.

The Seventh Circuit elaborated on the Supreme Court decision remanding *Arlington Heights* by outlining four critical factors that must be examined to determine whether defendant's action violates Title VIII. The first factor is the strength of plaintiffs' showing of discriminatory effect. The court held that the City of Arlington Heights' refusal to rezone perpetuated a history of segregation. The city was 99 percent white, and the waiting list for low income housing was 95 percent black. The second factor is whether plaintiffs have made some showing of discriminatory intent although not the amount needed to prove an equal protection violation. The Court said this was the least important factor of all, pointing to *Black Jack* as a situation where partial evidence of intent can be misleading. The third factor takes into consideration the defendant's interest in taking the action. The court distinguished between a private individual seeking to protect property rights and a governmental entity acting outside its scope of authority. The fourth factor is the nature of relief sought by the plaintiff. Under this factor courts should be more reluctant to grant relief when plaintiff wants to force defendant to take some affirmative remedial action. If plaintiff merely wants to enjoin defendant from blocking construction of a development the courts should respond more readily. *Id.* at 1290-93.

79. For a case citing *Arlington Heights* for this proposition, see Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977), *on remand*, 558 F.2d 350 (6th Cir. 1977), *cert. denied*, 434 U.S. 985 (1978).

80. This paradox may arise due to the different burdens of proof that attach to an allegation claiming a constitutional violation and an allegation claiming a statutory violation. Although a court may be confronted with the same governmental action, the result may ultimately turn on whether the complaint is couched in constitutional

Although most Title VIII litigation addresses *covert* discrimination,[81] the implementation of affirmative action programs by governmental authorities requires courts to determine the validity of benign *overt* racial classifications.[82] The Supreme Court recently completed a trilogy of cases dealing with affirmative action programs.[83] These cases attempt to define the appropriate level of scrutiny courts should use to evaluate the validity of benign racial classifications.

In *Regents of the University of California v. Bakke*,[84] a divided Supreme Court[85] held invalid the Davis Medical School's use of racial classifications[86] in its special admission program.[87] Justice Powell, announcing the judgment of the Court, stated that although the Davis admissions program was unconstitutional, the equal protection clause did not prohibit limited use of race in the admissions process.[88] Justice Powell found strict scrutiny[89] the appropriate level of

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or statutory terms. *See* notes 41-43 *supra*. If a plaintiff alleges a statutory violation all that must be shown is a disparate impact while on the other hand if the same plaintiff alleges a constitutional violation proof of discriminatory intent is necessary to obtain relief. The result of this dichotomy is that most plaintiffs will allege both statutory and constitutional violations, hoping of course, that the court will only require the lesser showing of impact thus making a constitutional analysis unnecessary. *See* notes 41-43, 75-76 *supra*.

81. *See* notes 41-43 and accompanying text *supra*.

82. Affirmative action programs in the area of housing are aimed at preventing white flight and resegregation as well as promoting initial integration. *See* note 10 *supra*.

83. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of America v. Weber, 443 U.S. 19 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

84. 438 U.S. 265 (1978).

85. *Id.* at 265-66. Justice Powell announced the Court's judgment and filed an opinion in which Justice White joined in Parts I, III-A and V-C. Justices Brennan, Marshall and Blackmun joined in Parts I and V-C of the Powell opinion. Justice Brennan, White, Marshall and Blackmun filed a separate opinion concurring in the judgment in part and dissenting in part. Justices White, Marshall and Blackmun also filed separate opinions. Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Burger and Justices Stewart and Rehnquist joined. *Id.*

86. *Id.* at 266. The University of California at Davis special admission program reserved sixteen of the one hundred places in each entering class exclusively for minorities. *Id.*

87. *Id.* at 287. Five Justices (Powell, Brennan, Blackmun, White and Marshall, J.J.) decided the question on constitutional grounds. Four Justices (Stevens, Burger, Stewart and Rehnquist, J.J.) never reached the constitutional issue, deciding that Title VI totally precluded any use of race. *Id.*

88. *Id.* at 270. Mr. Justice Powell felt that race could be used as one consideration

examination to determine the constitutionality of benign racial classifications.[90] In a separate opinion,[91] Justice Brennan concluded that a more lenient, middle tier analysis[92] better suited this equal protection controversy. Since neither Powell nor Brennan could capture a majority of the Court,[93] *Bakke* did little to clarify the appropriate standard by which to judge race-conscious affirmative action programs.[94]

In *United Steelworkers of America v. Weber*,[95] the Court addressed a race-conscious affirmative action program implemented by a private employer.[96] Plaintiff, a white employee, brought a Title VII challenge[97] against defendants on-the-job training program which re-

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in determining the basic qualifications of an applicant. Justice Powell thought that the Harvard admissions program was acceptable because it did not set numerical limits that resembled a quota. *Id.* at 315 n.51.

89. The Court developed strict scrutiny as a tool to evaluate racial classifications in Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), both dealing with the constitutionality of the Japanese relocation programs during World War II. The test looks for a compelling governmental interest and means that are necessary to the achievement of the objective. *See* Lee v. Washington, 390 U.S. 33 (1968) (racial segregation implemented to control unrest at a federal prison). For a more general discussion of the origin of the strict scrutiny test going back to footnote 4 of United States v. Carolene Products, 304 U.S. 144 (1938), see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW at 541-42 (10th ed. 1980). In *Bakke*, Mr. Justice Powell found a compelling governmental interest in educational diversity but stated that the means utilized by the medical school should be more narrowly drawn. 438 U.S. at 315.

90. 438 U.S. 315-19.

91. 438 U.S. at 324-79 (separate opinion of Brennan, J.).

92. *Id.* at 362. The test as outlined in Craig v. Boren, 429 U.S. 190 (1976), requires a program to be substantially related to an important governmental interest. *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

93. See notes 79, 85, 87 and accompanying text *supra*.

94. *See* Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1 (1980); Comment, *The Role of Structural Due Process in Equal Protection*, 29 KAN. L. REV. 99 (1980).

95. 443 U.S. 193 (1979).

96. *Id.* at 195. *Weber* involved a Kaiser Aluminum Company training program which provided that 50 percent of all persons admitted to the company's skilled craft training program would be black.

97. 42 U.S.C. § 2000e-17 (1976). In McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976), the Court held that Title VII protects whites as well as racial minorities from discrimination on the basis of race. Justice Marshall, writing for the Court, said:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race," . . . . Its terms are not limited to dis-

quired that blacks fill half of all the available openings.[98] The Court upheld the program, finding it within the area of discretion left by Title VII to the private sector.[99] Justice Brennan, writing for the majority, concluded that the spirit of the statute sanctioned voluntary, race-conscious efforts aimed at abolishing traditional patterns of segregation.[100] Since the Court decided *Weber* on narrow statutory grounds,[101] the opinion added little to the constitutional analysis of affirmative action programs implemented in the public sector.[102]

In *Fullilove v. Klutznick*,[103] the Supreme Court rejected a fifth amendment[104] challenge to a provision of the 1977 Public Works Employment Act[105] which required at least ten percent of all public works projects go to minority business enterprises.[106] All of the Jus-

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crimination against members of any particular race . . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans . . . ."

427 U.S. at 278-80 (citations omitted).

98. 443 U.S. at 197-99.

99. *Id.* at 209.

100. *Id.* at 201.

101. *Id.* at 204-05. The holding rested on narrow construction of Sections 703(a) and (d) of Title VII. *Id.*

102. *See* Meltzer, *The Weber Case: The Judicial Abrogation of the Anti-discrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980). The *Weber* case was a limited victory for race-conscious affirmative action. Justice Brennan's opinion in *Weber* is the only one in the affirmative action trilogy to capture a majority of the Court. This was perhaps possible because the opinion stressed its limited nature and refrained from detailed guidance as to circumstances in which race-conscious affirmative action would be appropriate. *Id.* at 443.

103. 448 U.S. 448 (1980).

104. The equal protection component of the fifth amendment's due process clause was explicitly articulated in Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). Although the concept is now well-settled, the extent to which equal protection concepts under the fourteenth amendment are incorporated through the fifth amendment and applied to the federal government has been a subject of dispute. Compare Justice Brennan's views in Weinberger v. Weisenfeld, 420 U.S. 636, 638 (1975) with those of Justice Stevens in Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

105. 42 U.S.C. §§ 6701-6710 (Supp. II 1978).

106. 42 U.S.C. § 6705(f)(2) (Supp. II 1978). The section provides:

Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned

tices comprising the six-to-three majority concluded that by enacting the set-aside provision Congress intended to remedy the effects of past discrimination.[107] Unable to agree on a single approach, the majority split into three opinions.[108] Chief Justice Burger, joined by Justice White, created a "close examination" test[109] which the Chief Justice implied was as strict as that of strict scrutiny.[110] Justice Powell joined in the judgment but stated that the Chief Justice should adhere to the structured analysis outlined in *Bakke*.[111] The three other Justices constituting the majority advocated the middle level of scrutiny.[112] Coupled with *Bakke*, *Fullilove* indicates that six members of the Court use a balancing appoach to evaluate governmental use of racial classifications to remedy official findings of discrimination.[113] At present, only one Justice does not accept some race distinction in affirmative action programs.[114]

The Massachusetts District Court treated *Schmidt v. Boston Housing Authority*[115] as a case involving covert racial discrimination.[116] The court evaluated the validity of the BHA Tenant Selection and

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by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id.

107. 448 U.S. at 477-78, 503-05, 520.

108. *Id.* at 453-522. Chief Justice Burger announced the judgment of the Court and delivered an opinion, in which Justices White and Powell joined, *Id.* at 453-95. Justice Powell filed a concurring opinion. *Id.* at 495-517. Justice Marshall filed an opinion concurring in the judgment, in which Justices Brennan and Blackmun joined. *Id.* at 517-22. Justice Stewart filed a dissenting opinion, in which Justice Rehnquist joined. *Id.* at 522-32. Justice Stevens filed a dissenting opinion. *Id.* at 532-54.

109. *Id.* at 472.

110. *Id.*

111. *Id.* at 496 (Powell, J., concurring).

112. *Id.* at 519 (Marshall, Brennan and Blackmun, J.J., concurring).

113. Six members of the Court (Burger, Brennan, White, Marshall Blackmun, Powell, J.J.) will use a balancing test of some type to evaluate a governmental use of racial classifications to remedy an official finding of discrimination. For Justice Stevens, the issue turns on whether the official findings of discrimination are clearly laid out by the governmental body. *Id.* at 532-54. *See also* notes 85-92 and accompanying text *supra*.

114. Justice Rehnquist is the only Justice on the Court presently who will not accept some use of race in a remedial affirmative action program under Title VI or Title VII. 100 S. Ct. at 522-32.

115. 505 F. Supp. 988 (D. Mass. 1981).

116. *See* notes 23-27 and accompanying text *supra*.

Assignment Plan by using both the impact[117] and the intent[118] standards of review. The court applied the *Griggs* impact analysis to the Title VIII claim[119] and the *Arlington Heights* purposeful discrimination standard to the equal protection issue.[120] The court's analytical approach would merit little criticism had the court correctly characterized the Plan as covert discrimination. In *Schmidt*, however, the District Court examined an overt racial classification.[121] The Plan, on its face, utilized race to determine who received priority status.[122] In failing to recognize the overt nature of the case, the court erred in not following the affirmative action analysis developed in *Bakke*, *Weber* and *Fullilove*.[123]

The *Schmidt* court circumvented the overt analysis by finding the BHA Plan facially neutral.[124] The court reached this conclusion because the Plan considered whites to be minorities if they applied for housing in a predominantly black populated project, and blacks as minorities where they sought housing in a predominantly white project.[125] This neutrality in terms of classifying persons as minorities for the assignment of priorities does not nullify the use of race as the determinative factor.[126] The Plan contained an overt racial classification and, as such, merited analysis as an affirmative action pro-

117. For cases relied on by the court, *see* note 60 *supra*.

118. The court cited Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), for the proposition that equal protection required proof of intent. The *Schmidt* court also stated that Title VI proscribed only those racial classifications which violate the Equal Protection Clause, citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 505 F. Supp. at 992-93.

119. 505 F. Supp at 994-95. The court held the impact to be legally insignificant. *See* note 29 *supra*.

120. 505 F. Supp at 993-96. The court examined the historical background of the Plan, noting that the program was of a remedial nature designed to comply with HUD and judicial directives. The court further pointed out the procedures followed to implement the Plan were not in any way unusual. *Id*. The *Schmidt* court utilized the criteria outlined in *Arlington Heights*, *supra* note 75.

121. *See* notes 16, 20, 39 and accompanying text *supra*.

122. *See* notes 19-21 *supra*.

123. *See* notes 83-114 and accompanying text *supra*.

124. 505 F. Supp. at 995.

125. *Id*.

126. The Supreme Court emphasized this point in note 27 of its decision in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978). The Court said the University's special admission program involved a purposeful, acknowledged use of racial criteria and that it was not a situation in which the decision was facially neutral

gram.[127] Although these programs are new to housing,[128] the extension of the overt analysis to Title VIII claims follows logically from the Supreme Court's current position in the affirmative action area.[129]

The *Schmidt* court cited *Bakke* for the proposition that Title VIII, like Title VI, is coterminous with the equal protection clause.[130] The analogy to *Bakke* should not stop at this point. The *Schmidt* court should have proceeded to evaluate the BHA plan in light of the Supreme Court's treatment of benign racial classifications. Although the appropriate level of scrutiny remains an unresolved issue,[131] the Supreme Court advocates a balancing approach when faced with race-conscious affirmative action programs.[132] Strict scrutiny is the most rigorous of the balancing tests articulated by the Court.[133] If the *Schmidt* court had found that the Plan could withstand this level of examination, the same conclusion would have followed under the less strict, middle-tier approach[134] formulated by other members of the Court. If the *Schmidt* court had chosen strict scrutiny, it could have applied the test without great difficulty and arrived at the same result.[135]

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and had a disproportionate impact. Any use of race to classify groups of individuals is necessarily suspect. *Id.*

127. *Id.*

128. *See* note 42 and accompanying text *supra*.

129. *See* notes 83-114 and accompanying text *supra*.

130. 505 F. Supp. at 993.

131. *See* notes 89, 92, 113 and 114 *supra*.

132. *See* notes 113 and 114 *supra*.

133. *See* note 89 *supra*.

134. *See* note 92 *supra*.

135. If the *Schmidt* court had undertaken this task, it first would have determined whether residential integration rises to a compelling governmental interest. In the areas of education (Brown v. Board of Educ., 347 U.S. 483 (1954)) and employment (United Steelworkers of America v. Weber, 443 U.S. 193 (1979)) the Supreme Court has recognized that integration is necessary to provide minorities with equal opportunities and eliminate the stigma attached to segregated areas of society. Minorities seem to gain the most from the BHA plan; the projects that were available to blacks as minority preference applicants were generally considered to be the more desirable developments in Boston. This fact coupled with the greater number of units open to blacks gives the appearance that the plan works to the detriment of whites. (*see* notes 15-20 *supra*). The Boston community as a whole will benefit if integration leads to reduced racial friction and promotion of more tolerant attitudes. *See generally* T. PETTIGREW, RACIALLY SEPARATE OR TOGETHER?, 274-78 (1971); Simpson & Yinger, *Equal Status, Housing Integration and Racial Prejudice*, in HOUSING URBAN

The *Schmidt* court, by refusing to recognize an overt racial classification, neglected the opportunity to make a valuable contribution to civil rights analysis. Although the court may have reached the proper result, application of the wrong standard added nothing to the development of the law. By utilizing the covert line of analysis to judge an overt racial classification, the *Schmidt* court promotes confusion in an area in need of clear and careful reasoning.

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AMERICA 147 (J. Pynoos, R. Schafer & C. Hartmann eds. 1973). The Plan creates the opportunity for minorities to move into areas that were previously inaccessible. The benefits that flow from the creation of this opportunity are sufficiently compelling to justify the use of racial classification.

At the next step in strict scrutiny analysis, the *Schmidt* court would have determined whether the use of benign racial classifications by the BHA is necessary to achieve integration at their housing developments. The strongest argument against the necessity of such programs is that integration could be produced by a vigilant application of the anti-discrimination provisions of Title VIII. But these provisions do not promote integration or prevent tipping. Although prejudicial fears about the entry of minority residents are ugly, they are a reality that must be confronted. The BHA plan assures white residents that black entry into the community will not exceed the racial balance in the City of Boston. The Plan encourages integration and decreases the possibility of white flight leading to resegregation. *See* note 10 *supra*.