SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 61 | Issue 2

2010

Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine under Title VIII

Lindsey E. Sacher

THROUGH THE LOOKING GLASS AND BEYOND: THE FUTURE OF DISPARATE IMPACT DOCTRINE UNDER TITLE VIII

INTRODUCTION

The disparate impact theory, which allows a plaintiff to make out a case of discrimination without proving the defendant's intent to discriminate,[1] has been one of the most controversial and highly debated areas of antidiscrimination law.[2] Despite the criticism it has received, disparate impact doctrine is almost universally accepted as an important part of antidiscrimination law.[3] Still, disparate impact doctrine is fraught with inconsistencies and variations that have proven a source of confusion among courts and scholars, particularly in the contexts of employment and housing discrimination.

While Supreme Court precedent and the Civil Rights Act of 1991[4] have given courts ample guidance in addressing disparate impact claims brought under Title VII of the Civil Rights Act ("Title VII"),[5] the law is less settled with respect to cases brought under the Fair Housing Act,[6] also known as Title VIII of the Civil Rights Act of 1968 ("Title VIII").[7] The Supreme Court has never ruled on whether Title VIII includes a disparate impact standard, however, all of the circuit courts to address the issue have answered this question in the

[1] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[2] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

[3] Deborah Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1693 (1997).

[4] Pub. L. No. 102–166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e (2000)). *See* Part I.A for further discussion of the 1991 Act.

[5] 42 U.S.C. §§ 2000e–2000e-17 (2006).

[6] Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 416 (1998) (discussing the inconsistencies in Title VIII jurisprudence).

[7] 42 U.S.C. §§ 3601–3619 (2006).

affirmative.[8] Still, these lower courts have failed to reach a consensus over the proper test to apply when evaluating disparate impact claims brought under Title VIII. While a number of courts have adopted the "burden-shifting" test commonly applied in Title VII cases,[9] other courts continue to apply a quasi-constitutional "balancing test" developed in early Title VIII decisions.[10]

In addition to this divide over the proper standard, questions have recently arisen over the relationship between disparate impact doctrine and the constitutional guarantee of equal protection. Specifically, the Supreme Court's recent decision in *Ricci v. DeStefano*[11] raises the possibility that disparate impact doctrine may directly conflict with equal protection.[12] As *Ricci* suggests, disparate impact may encourage third parties to engage in race-conscious decision making. And disparate impact provisions may, themselves, qualify as "racial classifications," such that equal protection jurisprudence would compel a strict scrutiny analysis.[13]

Therefore, assuming that a constitutional challenge is inevitable,[14] courts must construe the disparate impact doctrine in a manner that comports with equal protection and strict scrutiny analysis. While courts have utilized disparate impact as both a method of remedying the social hierarchies that have resulted from past discrimination and

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[8] Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev., 56 F.3d 1243, 1250–51 (10th Cir. 1995); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1543 (11th Cir. 1994); Casa Marie, Inc. v. Superior Court of P.R., 988 F.2d 252, 269 n.20 (1st Cir. 1993); United States v. Starrett City Assocs., 840 F.2d 1096, 1100 (2d Cir. 1988); Keith v. Volpe, 858 F.2d 467, 482–84 (9th Cir. 1988); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); United States v. Mitchell, 580 F.2d 789, 791–92 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147–48 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974)). *See generally* John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 174 (2002) ("[V]irtually every jurisdiction has held that the 'disparate impact' discrimination analysis is appropriate in FHA cases.").

[9] *See, e.g.*, Betsey v. Turtle Creek Assocs., 736 F.2d 983 (4th Cir. 1984); *Rizzo*, 564 F.2d 126; *City of Black Jack*, 508 F.2d 1179; Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin 885 N.E.2d 1274, 1280–85 (Ind. 2008).

[10] *See, e.g.*, *Mountain Side*, 56 F.3d 1243, 1252; Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), *judgment aff'd in part*, 488 U.S. 15 (1988); *Arlington Heights II*, 558 F.2d 1283.

[11] 129 S. Ct. 2658 (2009).

[12] *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) [hereinafter, Primus, *Future*] (demonstrating that while *Ricci* was an employment case brought under Title VII, its implications for disparate impact extend beyond the employment context).

[13] *See infra* Part II.B for a complete discussion of these issues.

[14] *See Ricci*, 129 S. Ct. at 2683 (Scalia, J., dissenting) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.").

an "evidentiary dragnet" designed to "smoke out" instances of intentional discrimination,[15] the doctrine is most likely to survive a constitutional challenge under the latter construction.[16] Specifically, when viewed as a tool for uncovering instances of intentional discrimination that are often difficult or impossible to prove, disparate impact may survive strict scrutiny review; the government's interest in deterring racial discrimination may be sufficiently compelling to justify the race-based classifications that disparate impact either embodies or promotes.[17]

Because strict scrutiny also requires that racial classifications be "narrowly tailored" to serve a compelling government interest, however, disparate impact must also operate in a manner that directly serves the government's interest in remedying hidden intentional discrimination, without imposing an undue burden on innocent parties.[18] While the concept of "narrow tailoring" remains largely undefined, this requirement may provide valuable guidance to courts searching for the proper test to apply in Title VIII cases.

As this Note will illustrate, the "balancing test" formulation of disparate impact may prevent the doctrine from effectively serving the government's interest in preventing intentional discrimination, such that disparate impact provisions may not satisfy the narrow tailoring requirement. And because the balancing test often fails to consider the full extent of a defendant's legitimate, non-discriminatory interests, it may unduly burden defendants who are undeserving of liability under the evidentiary dragnet view of disparate impact. Moreover, since the balancing test often measures the adverse effects of a housing practice based only on the income of potential applicants, it may lead courts to dismiss cases where a discriminatory motive *is* present, as housing providers often rely on factors other than income when deciding how to allocate housing.[19]

In contrast to the balancing test, the burden-shifting analysis may more effectively serve the government's interests in rooting out intentional discrimination, as it offers courts the opportunity to

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[15] *See* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 520–21 (2003) [hereinafter, Primus, *Round Three*] (describing these constructions of disparate impact doctrine).

[16] Primus, *Future*, *supra* note 12, at 1383–84 (arguing that disparate impact is most likely to serve a compelling interest when interpreted as an evidentiary dragnet).

[17] *Id.* at 1378 ("The compelling interest in remedying hidden intentional discrimination may justify the existence of disparate impact doctrine . . . .").

[18] *See, e.g.*, City of Richmond v. J. A. Croson Co., 488 U.S. 469, 506–08 (1989) (plurality opinion) (discussing the "narrowly tailored" requirement).

[19] *See infra* Part III(C)(1).

expose the true motives behind a defendant's actions. The burden-shifting analysis may also reduce the pressure felt by employers and housing providers to take race-conscious actions for the sole purpose of avoiding disparate impact liability, thus reducing one potential source of constitutional conflict.[20] Thus, if disparate impact is to survive a constitutional challenge within the framework of strict scrutiny, courts should adopt the burden-shifting test as the proper framework for Title VIII disparate impact claims. [21]

Of course, the different contexts and concerns faced by employers and housing providers indicate that burden-shifting analysis, as it is applied in Title VII, may not be an entirely perfect fit for Title VIII disparate impact claims. Though Title VII provides a proper framework, several modifications to the test are warranted when applied in the housing context. Specifically, this Note argues that because certain justifications carry less weight in the housing context, Title VIII defendants seeking to justify their practices under the "business necessity" prong of the burden-shifting analysis must satisfy a higher standard.

Part I of this Note will illustrate the development and current application of disparate impact doctrine, and will underscore the lack of consistency among lower courts over the proper test to apply in Title VIII cases. Part I will also highlight the two most commonly applied standards, including the *Arlington Heights II* "balancing test" and the Title VII "burden-shifting" test. Part II will identify and explore an additional source of confusion in disparate impact doctrine—the possible conflict recognized in *Ricci* between disparate impact doctrine and the constitutional principle of equal protection. Part III will explore how, despite this conflict, disparate impact may survive a constitutional challenge within the framework of strict scrutiny, even when construed as an "evidentiary dragnet." If disparate impact is to satisfy the narrow-tailoring requirement of strict scrutiny, however, only the burden-shifting test will achieve this result. Finally, Part IV will discuss the differences between housing and employment, and will argue in favor of certain variations on the burden-shifting test when applied to Title VIII, particularly with respect to the "business necessity" prong of the analysis. Specifically, Part IV will argue that while a heightened business necessity standard akin to constitutional "intermediate scrutiny" may be most appropriate in cases involving private defendants, a higher

[20] *See infra* Part II.B.1 (discussing sources of the constitutional conflict).
[21] *See infra* Part III.C.2.

"compelling business necessity" standard is warranted for government defendants in light of the remedial or regulatory functions they often perform in the housing industry.

I. DEVELOPMENT OF DISPARATE IMPACT DOCTRINE

A. Foundations in Employment

The Supreme Court first recognized the concept of disparate impact as a basis for liability under Title VII of the Civil Rights Act of 1964 ("1964 Act") in *Griggs v. Duke Power Co*.[22] Although the words "disparate impact" never appeared in the original version of the 1964 Act, the *Griggs* Court found that the language of section 703(a)(2), which makes it unlawful for an employer 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 race,"[23] demonstrated a congressional intent to prohibit practices producing a disparate effect on members of certain groups. Noting that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,"[24] the Court held that the Act proscribes not only overt discrimination but also practices that are "fair in form, but discriminatory in operation."[25] While this reading of Title VII was once largely criticized,[26] Congress never overruled it. Instead, when Congress amended Title VII in the Civil Rights Act of 1991,[27] it codified Title VII's disparate impact standard by placing those words into the statute, and by addressing the mechanics of a disparate impact claim.[28] As amended, the statute provides:

> An unlawful employment practice based on disparate impact is established under this title only if—

[22] 401 U.S. 424 (1971).

[23] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(2) (2006)) (emphasis added).

[24] *Griggs*, 401 U.S. at 432.

[25] *Id.* at 431.

[26] *See e.g*., George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1298 (1987) (arguing that such a reading was "extremely strained").

[27] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e (2006)).

[28] Primus, *Round Three*, *supra* note 15, at 507 (citing Pub. L. No. 102-166, 105 Stat. at 1074).

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
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> (ii) the complaining party . . . [identifies an adequate] alternative employment practice and the respondent refuses to adopt such an alternative employment practice.[29]

While the Supreme Court once required plaintiffs to carry the burden of persuasion on the issue of business necessity,[30] the 1991 Act affirmatively placed that burden on the defendant.[31] Under the current version of the statute, a plaintiff bears the initial burden of establishing a prima facie case, and must show that the employer's practices produce a disparate impact on members of a certain group. In the employment context, plaintiffs can only satisfy this burden by showing that three factors are satisfied.[32] First, the plaintiff must identify the *specific employment practice* that is challenged. Second, the plaintiff must demonstrate that the practice has an *adverse impact* on a specific class of persons protected by Title VII. Finally, the plaintiff must show that the defendant's practice actually caused the disparate impact in question, which means the plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the [employment] practice in question has caused the exclusion of applicants . . . because of their membership in a protected group."[33] If a plaintiff makes this initial showing, the burden then shifts to the defendant to show that the employment practice has a manifest relationship to the employment in question.[34] If the defendant successfully proves that the challenged practice serves a business necessity, the burden of persuasion shifts back to the plaintiff, who

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[29] 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

[30] *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[31] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006). For a discussion of the "business necessity" defense under Title VII, see *infra* Part IV.A.

[32] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (opinion of O'Connor, J.) (plurality opinion).

[33] *Id.* While the 1991 Act overruled the Supreme Court's decision to allocate the burden of persuasion on the issue of business necessity to the plaintiffs, it simply codified the Court's articulation of the standards for a prima facie case of disparate impact. George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2316–17 (2006). *See also* Mahoney, *supra* note 6, at 457 (noting that *Wards Cove* remains good law on points other than its allocation of the burden of persuasion on business necessity to plaintiffs).

[34] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

must prove that alternative practices that do not produce the same racial effect are available and would "serve the employer's legitimate interests" just as well.[35]

B. Disparate Impact under Title VIII: Fact or Fiction?

Title VIII of the Civil Rights Act of 1968 makes it unlawful to "refuse to sell or rent . . . a dwelling to any person because of race."[36] While this language is recognized as a prohibition on disparate treatment or *intentional* racial discrimination,[37] the Supreme Court has never ruled on whether Title VIII's antidiscrimination provisions extend beyond actions taken with a discriminatory purpose to practices that merely produce a discriminatory effect on members of a protected class.[38] However, all of the federal circuit courts to address the question have allowed disparate impact recovery under Title VIII.[39] While this fact is not determinative of how the Supreme Court would rule,[40] it nonetheless provides support for the proposition. The following sections will outline how various indicators, including principles of statutory construction, congressional intent, and Supreme Court precedent, support the existence of a disparate impact standard under Title VIII.

1. Principles of Statutory Construction

Many proponents of a Title VIII disparate impact standard emphasize the statute's "because of race" language that also appears in Title VII.[41] These proponents reason that because the Supreme Court has recognized such language as giving rise to a disparate

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[35] *Watson*, 487 U.S. at 998 (quoting Abemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

[36] 42 U.S.C. § 3604(a) (2006). While Title VIII also prohibits discrimination on the basis of "color, religion, sex, familial status, or national origin," *id.*, this Note will focus primarily on race-based discrimination.

[37] While "disparate treatment" and "intentional discrimination" may have once carried two separate meanings, the terms have become virtually interchangeable. *See* Primus, *Future*, *supra* note 12, at 1351–52 n.56 (noting that the term "disparate treatment" covers "both formal differences in the treatment of people of different groups *and* unlawful employer motives") (emphasis added)).

[38] Additionally, Title VIII contains no express language referencing a disparate impact standard. *Cf.* 42 U.S.C. § 2000(e)-2(k)(1)(A)(i) (2006) (codifying disparate impact under Title VII).

[39] *See* sources cited *supra* note 8.

[40] *See infra* Part I.B.1 (discussing the Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005)).

[41] *See* Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin 885 N.E.2d 1274, 1282 (Ind. 2008) ("Because Title VII and the FHA use the same language in prohibiting discrimination, we should apply the same framework to both.").

impact claim in the employment context,[42] principles of statutory construction suggest that the "because of race" language used in Title VIII also gives rise to a claim of disparate impact.[43] Until recently, this argument was tempered by the fact that the same "because of" language also appears in the Age Discrimination in Employment Act ("ADEA"),[44] which many lower courts have declined to interpret as encompassing a disparate impact standard.[45] However, the Supreme Court's decision in *Smith v. City of Jackson* has virtually eliminated this problem.[46]

In *Smith*, the Court held that the ADEA *does* encompass a cause of action for disparate impact.[47] In reaching this conclusion, the Court relied heavily on principles of statutory construction, particularly the premise that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[48] After characterizing its finding of disparate impact under Title VII in *Griggs* as "precedent of compelling importance,"[49] the Court went on to explain that neither Title VII nor the ADEA merely prohibit actions that expressly "limit, segregate, or classify" persons based on race.[50] Instead, both

[42] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[43] *See* Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 222 (1978) ("[T]hese employment cases suggest that a discriminatory effect theory should be adopted in appropriate private Title VIII cases as well.").

[44] 29 U.S.C. § 623(a)(2)(2006) ("It shall be unlawful for an employer . . . 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.") (emphasis added).

[45] Primus, *Round Three*, *supra* note 15, at 507 n.53 (citing Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732–43 (3d. Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1076–78 (7th Cir. 1994)). It is important to note, however, that these cases were decided after the Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), where Justice Kennedy noted in a concurring opinion that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact theory' of Title VII . . . ." *Id.* at 618 (Kennedy, J., concurring). Prior to this pronouncement, there had been little doubt among lower courts that the ADEA did encompass a disparate impact standard. *See* BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 416 n.16 (2003) (listing pre-*Hazen Paper* decisions from Courts of Appeals recognizing a disparate impact standard under the ADEA).

[46] 544 U.S. 228 (2005).

[47] *Id.* at 240.

[48] *Id.* at 233 (quoting Northcross v. Bd. of Ed. of Memphis City Schs., 412 U.S. 427, 428 (1973) (per curiam)).

[49] *Id.* at 234.

[50] *Id.* at 235.

prohibitions extend to actions that "otherwise adversely affect [a person's] status as an employee."[51]

Similarly, the language of Title VIII extends beyond overt acts of discrimination to reach actions that "*otherwise* make unavailable or deny, a dwelling to any person because of race."[52] Like Title VII and the ADEA, this language focuses on the *effects* of a practice rather than the actor's *motivation*.[53] Therefore, the Court's logic in *Smith* should apply with equal force to Title VIII, and the language similarities between Title VII and Title VIII thus support a conclusion that Title VIII includes a disparate impact standard.

2. Legislative Purpose

Despite the strong indications that the language similarities between Title VII and Title VIII support recognition of a disparate impact under Title VIII, at least one critic has noted that the *language* of Title VII "has never been the real source of disparate impact doctrine."[54] Moreover, the Court itself has even recognized that its "opinion in *Griggs* relied primarily on the purposes of the Act," rather than on its reading of the statutory text.[55] This suggests that similarities in statutory language may not suffice as the sole basis for finding a disparate impact standard under Title VIII. Therefore, courts should also analyze the Congressional motives behind Title VIII to help determine whether Congress intended to impose a disparate impact standard.

In its first Title VIII opinion,[56] the Court drew from the legislative history and determined that the Congressional purpose behind Title VIII was to achieve "truly integrated and balanced living patterns."[57] Classifying housing integration as a "policy that Congress considered to be of the highest priority,"[58] the Court held that Title VIII should

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[51] *Id.* (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988)). The *Watson* Court explained that employer actions that produce a disparate impact may be said to "adversely affect" an individual's status as an employee. *Watson*, 487 U.S. at 991.

[52] 42 U.S.C. § 3604(a) (2006) (emphasis added).

[53] *See Smith*, 544 U.S. at 234 ("Congress . . . 'directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971))).

[54] Primus, *Round Three*, *supra* note 15, at 506.

[55] *Smith*, 544 U.S. at 235. However, the Court also noted that it later recognized the *Griggs* holding as an appropriate reading of the statutory text. *Id.* (citing *Watson*, 487 U.S. at 991).

[56] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

[57] *Id.* at 211 (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

[58] *Id.*

be broadly construed in order to achieve that goal.[59] Notably, the Court based its conclusion on a Title VII decision,[60] and many lower courts since then have followed this lead. In particular, the Second Circuit in *Huntington Branch, NAACP v. Town of Huntington*[61] relied on the Court's interpretation of Title VII in *Griggs*, and held that a Title VIII violation could be established based solely on disparate impact.[62] According to the *Huntington* court, it is appropriate to interpret both statutes in a similar manner because they are "part of a coordinated scheme of federal civil rights laws enacted to end discrimination; [and] the Supreme Court has held that both statutes must be construed expansively to implement that goal."[63] Thus, the court concluded that achievement of Title VIII's stated purpose "requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation."[64] Under this reading, the similar goals behind Title VII and Title VIII support the conclusion that disparate impact is a vital component of Title VIII's provisions.

3. The Arlington Heights Ruling

In addition to statutory construction and indicators of legislative intent, the Supreme Court's decision in *Metropolitan Development Corp. v. Village of Arlington Heights* (*Arlington Heights I*)[65] supports an inference that the Court would recognize a disparate impact cause of action under the statute if confronted with the issue. In *Arlington Heights*, the plaintiffs brought housing discrimination claims under both Title VIII and the Equal Protection Clause of the Fourteenth Amendment.[66] When the Seventh Circuit decided only the equal protection claim, the Supreme Court reversed, and remanded the case for consideration of the Title VIII claim as well.[67] While the Court has never expressly ruled on whether Title VIII encompasses a disparate impact cause of action, critics have inferred that the Court's

[59] *Id.* at 212.

[60] *Id.* at 209 (relying on the holding in Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971)).

[61] 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

[62] *Id.* at 935.

[63] *Id.*

[64] *Id.* at 934 (citing John Stick, Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 406 (1979)).

[65] 429 U.S. 252 (1977).

[66] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975).

[67] *Arlington Heights I*, 429 U.S. at 253.

remand for of the Title VIII claim indicated the Justice's belief that a different analytical framework should apply depending on whether a, claim is brought under equal protection or under Title VIII.[68]

C. In Search of a Proper Test: Competing Standards

While it is now almost universally accepted that Title VIII encompasses a cause of action under disparate impact theory,[69] the proper test to apply in Title VIII cases involving disparate impact claims remains a major source of confusion. While the abundance of employment discrimination cases brought pursuant to Title VII has given courts and scholars ample opportunity to develop some consistency in that area of law, Title VIII doctrine remains relatively unexplored, creating substantial confusion with respect to the proper test for disparate impact doctrine in housing cases.[70] Despite the Supreme Court's silence on the issue, lower courts have articulated and applied a variety of standards. Particularly since Title VIII's enactment in 1964, courts have drawn from two different and often conflicting lines of authority—equal protection principals and Title VII employment discrimination standards.[71] From these lines of authority, the circuit courts have developed and applied two main tests to disparate impact claims—the balancing test developed in *Arlington Heights II* and *Huntington*, ("the balancing test") and the burden-shifting analysis ("the burden-shifting test") derived from Title VII's statutory framework and its associated case law.[72]

1. The Balancing Test

Relying largely on the constitutional principle of equal protection, the Eighth Circuit became the first federal court to find liability under Title VIII based on discriminatory effect alone.[73] Several early

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[68] *See* Schwemm, *supra* note 43, at 227 ("*Arlington Heights* is the strongest hint yet given by the Court that it would be appropriate to apply a [different] standard . . . in Title VIII cases.").

[69] For a list of cases following this reasoning, see *supra* note 8.

[70] *See* Mahoney, *supra* note 6, at 416 (discussing the lack of the courts' and scholars' understanding of the application of disparate impact in fair housing and lending laws).

[71] *Id.* at 425–26 (discussing the development of the authoritative dichotomy).

[72] *Id.* at 434, 437–38.

[73] United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974). While at least one commentator has described *Black Jack* as employing a balancing test, *see* Stick, *supra* note 64, at 416 ("[T]he *Black Jack* test incorporated a balancing component . . . ."), it is clear from the court's discussion that it in fact conducted a burden-shifting analysis. *See Black Jack*, 508 F.2d at 1185 ("Once the plaintiff has established a prima facie case . . . the burden shifts to the governmental defendant to [justify its practice].").

decisions that followed the Eighth Circuit's lead applied a quasi-constitutional "balancing test" to claims of disparate impact under Title VIII.[74] In *Arlington Heights II*,[75] the Seventh Circuit identified four factors that courts should balance when evaluating a disparate impact claim: (1) the strength of the plaintiff's showing of a discriminatory effect; (2) evidence of discriminatory intent; (3) the "defendant's interest in taking the action complained of"; and (4) whether the "plaintiff seek[s] to compel the defendant to affirmatively provide housing," or merely to remove obstacles (such as zoning restrictions) to private provision of such housing.[76]

The Second Circuit revisited this test in *Huntington Branch, NAACP v. Town of Huntington*.[77] While the *Huntington* court also applied a "balancing test," it modified the *Arlington Heights II* factors in several important ways.[78] For instance, rather than focusing on "absolute numbers" as evidence of discriminatory impact under the first factor, the Second Circuit looked instead to the *proportion* of a protected class affected by a defendant's practice.[79] The court also deferred less to the defendant's interests, requiring that the action complained of serve a "bona fide and legitimate justification[]," and that no less restrictive alternatives exist.[80] Finally, the Second Circuit entirely rejected the "intent" factor set forth in *Arlington Heights II*, reducing the number of pertinent factors to three.[81] The Sixth and Tenth Circuits have adopted the *Huntington* approach, balancing only these three factors.[82]

2. The Title VII Burden-Shifting Test

Despite the early prevalence of the *Arlington Heights II* balancing test for Title VIII claims, many courts have recently shied away from this approach, looking instead to Title VII for guidance.[83]

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[74] *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (*Arlington Heights II*), 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988).

[75] 558 F.2d 1283.

[76] *Id.* at 1290.

[77] 844 F.2d 926.

[78] *See* Mahoney, *supra* note 6, at 439–40 (discussing the *Huntington* court's revisions).

[79] *Huntington*, 844 F.2d at 938.

[80] *Id.* at 939.

[81] *Id.* at 935 ("Practical concerns also militate against inclusion of intent in any disparate impact analysis.").

[82] Mountain Side Mobile Estates P'ship v. Sec'y of Hous. and Urban Dev., 56 F.3d 1243, 1252 (10th Cir. 1995); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986).

[83] *See, e.g.*, *Mountain Side*, 56 F.3d 1243; Betsey v. Turtle Creek Assocs., 736 F.2d 983

Specifically, these courts have imported the burden-shifting framework from the employment discrimination decisions.[84] The Third Circuit led the way in this regard with its opinion in *Resident Advisory Board. v. Rizzo*,[85] where it applied Title VII's version of the burden-shifting analysis to a Title VIII disparate impact claim.[86] After analyzing the competing lines of disparate impact precedent, the court determined that Title VII standards should govern. The Fourth Circuit followed suit several years later in *Betsey v. Turtle Creek Associates*,[87] abandoning its prior line of equal protection cases.[88] Notably, the court also recognized the difference between private and governmental defendants in the housing context, a distinction that will be further explored in Part IV.

More recently, despite the Seventh Circuit's continued application of the balancing test, the Indiana Supreme Court rejected that standard in favor of a burden-shifting framework,[89] noting that "most federal circuits have abandoned the *Arlington Heights* factors altogether."[90] In discussing its reasons for choosing the burden-shifting standard, the court pointed to evidentiary concerns. These concerns and others will be addressed in greater detail in Part III of this Note. As Part III will illustrate, such issues indicate that if disparate impact under Title VIII is to survive strict scrutiny in the

(4th Cir. 1984); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977); Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1280–85 (Ind. 2008).

[84] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30, 436 (1971) (analyzing the plaintiffs' claims under Title VII).

[85] 564 F.2d 126 (3d Cir. 1977). In *Rizzo*, the City of Philadelphia cancelled construction of a low-income housing project, and eligible persons sued under a disparate impact theory. The court found for plaintiffs based on a prima facie case and the absence of any justification by the city. *Id.* at 149.

[86] Mahoney, *supra* note 6, at 436. While the Eighth Circuit in *Black Jack* was the first to conduct a burden-shifting analysis, it did not employ the same version of the test as courts addressing Title VII claims. Specifically, the Eighth Circuit required the defendant to justify its action based on "compelling governmental interest," a much higher standard than that required under Title VII. United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974).

[87] 736 F.2d 983 (4th Cir. 1984).

[88] *Id.* at 987–88 (recognizing the "parallel objectives of Title VII and Title VIII").

[89] Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1282 (Ind. 2008) (noting that while "[f]ederal district courts in the Seventh Circuit are of course obligated to follow Seventh Circuit precedent, including *Arlington Heights II*," state courts "are not so restricted").

[90] *Id.* at 1281 (citing Charleston Hous. Auth. v. U.S. Dept. of Agric., 419 F.3d 729 (8th Cir. 2005); Tsombanidis v. West Haven Fire Dept., 352 F.3d 565 (2d Cir. 2003); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442 (3d Cir. 2002); Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998)).

event of a constitutional challenge,[91] it must formally adopt the burden-shifting analysis and abandon the balancing test.

II. THROUGH THE LOOKING GLASS: A POSSIBLE CONSTITUTIONAL CONFLICT

A. Disparate Impact and Equal Protection

In addition to the confusion among lower courts over the proper test to apply in Title VIII disparate impact cases, the recent Supreme Court decision in *Ricci v. DeStefano*[92] has added another variable to the mix—a potential conflict between disparate impact doctrine and the equal protection provisions of the Fifth and Fourteenth Amendments.[93] In the past four decades, several rounds of legal questions have arisen regarding the relationship between these two doctrines.[94] In the first round, the main concern of courts and commentators was whether an equal protection challenge could be sustained on the basis of discriminatory effects alone.[95] The Supreme Court's decision in *Washington v. Davis* answered this question in the negative, holding that an equal protection challenge would only be sustained upon a showing of discriminatory intent.[96] The Court did, however, empower the legislatures to impose statutory disparate impact standards.[97]

The second round of legal questions regarding the relationship between disparate impact and equal protection involved the source of authority for statutes prohibiting facially neutral practices that produce a discriminatory effect.[98] Specifically, courts and commentators struggled with whether such statues were "valid only as commerce legislation or also as a means of enforcing equal protection under Section 5 of the Fourteenth Amendment."[99] While

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[91] *See infra* Part II.

[92] 129 S. Ct. 2658 (2009).

[93] *See* U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person in its jurisdiction the equal protection of the laws"). While not expressly stated, the same provision has been read into the Fifth Amendment, which applies to the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954). In *Sharpe*, the Supreme Court held that the Fifth Amendment's Due Process Clause prohibits the District of Columbia from maintaining segregated schools, noting that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government," than the Fourteenth Amendment imposed upon the States. *Id.* at 500.

[94] Primus, *Round Three*, *supra* note 15, at 494.

[95] *Id.* at 494–95.

[96] *Id.* at 495 (citing Washington v. Davis, 426 U.S. 229, 248 (1976)).

[97] *Id.*

[98] *Id.*

[99] *Id.* at 495.

this series of questions remains largely unresolved,[100] a third question has arisen in recent years—whether, instead of serving as a source of authority for disparate impact statutes, the Equal Protection clause may in fact *prohibit* statutes that impose disparate impact standards,[101] as they may compel the kinds of racial classifications that equal protection forbids.[102]

Until recently, this third question was merely academic. In light of the Supreme Court's recent decision in *Ricci*, however, it appears that "what was once academic speculation is now judicially actionable."[103] Although *Ricci* marks the Supreme Court's first consideration of the possible conflict between Equal Protection and disparate impact, this does not mean that such a conflict did not previously exist.[104] Moreover, while *Ricci* involved an employment discrimination claim, it raises issues that apply to virtually all areas of antidiscrimination law, such as whether "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among its citizens,"[105] or whether the Constitution is color-conscious, such that "[i]n order to get beyond racism, we must first take account of race."[106] In light of the Fourteenth Amendment's prohibition on disparate treatment (absent a compelling state interest), *Ricci* also raises questions over when it is permissible, if ever, to "intentionally discriminate in order to avoid the unintended discrimination that might otherwise result from facially neutral policies."[107]

B. Ricci v. DeStefano: The Case and Controversy

In *Ricci*, several firefighters (seventeen whites and one Hispanic) brought suit against the New Haven, Connecticut, Civil Service Commission when the Commission refused to certify the results of a

[100] *Id.* at 495 n.4.

[101] *Id.* at 495.

[102] *Id.*

[103] Primus, *Future*, *supra* note 12, at 1343.

[104] *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. (August 26, 2009) at 18, *available at* http://ssrn.com/abstract=1462431 (observing that the absence of consideration does not mean that such a conflict did not previously exist).

[105] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[106] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978).

[107] Marcus, *supra* note 104, at 2. While the Court plainly held that such intentional discrimination was impermissible under the circumstances in *Ricci*, it left open the possibility that race-conscious actions may be appropriate in certain instances, such as where an employer could establish a "strong basis in evidence" that disparate impact liability would result in the absence of race conscious measures. *Ricci*, 129 S. Ct. at 2677.

promotional exam in the City's fire department.[108] The fire department administered the exam in order to select candidates for promotion to fill eight vacant senior positions.[109] When the results were tabulated, the top-ten scores went to white candidates, meaning that certification of the results would ensure that no black candidates would receive promotions.[110] Seeking to avoid liability for discrimination under the disparate impact provision of Title VII, the Commission threw out the results of the test.[111] Accordingly, several white and hispanic firefighters who would have received promotions had the results been certified brought suit under Title VII and the Equal Protection Clause, alleging that the Commission had discriminated against them on the basis of race.[112] New Haven argued in defense that its decision to discard the results was based on a good-faith belief that if the Commission had certified the results, it would have been found liable under Title VII's disparate impact provision, for adopting a practice with negative impacts on minority firefighters.[113] The Second Circuit agreed, and affirmed the district court's grant of summary judgment for the City.[114]

Reversing the Second Circuit's ruling, the Supreme Court held in favor of the plaintiffs, declaring that New Haven's ace-based decision making violates Title VII.[115] Justice Kennedy, writing for a five-justice majority, expressly rejected the city's argument that race-based actions may be justified by a "good-faith belief" that those actions are necessary to avoid liability under disparate impact.[116] Allowing such a justification would "amount to a de facto quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'"[117]

Therefore, instead of the proposed "good faith belief" standard, the Court applied a new "strong basis in evidence," standard, which, according to Justice Kennedy, would allow disparate treatment in the

[108] *Ricci*, 129 S. Ct. at 2664, 2670.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 2671.

[114] Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (holding that the civil service board's actions were protected because the board attempted to comply with its Title VII obligations).

[115] *Ricci*, 129 S. Ct. at 2664.

[116] *Id.* at 2675 ("A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination.").

[117] *Id.* (quoting Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality opinion)).

name of avoiding disparate impact under Title VII only when the defendants could show a "strong basis in evidence" that disparate impact liability would result.[118] Still, Kennedy observed that New Haven had not satisfied this test, noting "a threshold showing of a significant statistical disparity and nothing more—is far from a strong basis in evidence that the City would have been liable" under disparate impact theory.[119] As a result, the Court rejected New Haven's arguments that its actions were necessary to avoid disparate *impact* liability, and held that New Haven had violated Title VII's prohibition on disparate *treatment*.[120]

Notably, the Court avoided addressing the constitutional dilemma,[121] "merely postpon[ing] the evil day" when the Court must decide "[w]hether, or to what extent, are the disparate-impact provisions . . . consistent with the Constitution's guarantee of equal protection."[122] By deciding the case upon statutory principles alone, the Court developed what Richard Primus calls "the *Ricci* premise," framing Title VII's disparate impact doctrine as the exception to Title VII's prohibition on disparate treatment.[123] The Court's analysis indicates that disparate treatment *may* be acceptable under Title VII, particularly in cases where disparate treatment is necessary to avoid imposing disparate effects on racial groups.[124] While this analysis seems to reconcile disparate impact with disparate treatment by recognizing a statutory carve-out,[125] the question of constitutionality remains.

While the Court articulated its opinion as a matter of statutory interpretation, the constitutional implications of *Ricci* cannot be ignored. As Primus describes, the Court's treatment of disparate impact as the exception to Title VII's prohibition on disparate treatment indicates the Court's recognition of an inherent conflict between the two doctrines, absent a judicially-created exception.[126]

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[118] *Id.* at 2675–76 (citing Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989)).

[119] *Id.* at 2678 (citation omitted).

[120] *Id.* at 2681.

[121] *Id.* at 2676 (noting that the Court's analysis says nothing about equal protection); *see also* Primus, *Future*, *supra* note 12, at 1342 (classifying the Court's decision against ruling on the plaintiffs' equal protection claim as a "gesture of constitutional avoidance").

[122] *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

[123] Primus, *Future*, *supra* note 12, at 1343.

[124] *See Ricci*, 129 S. Ct. at 2677 (holding that an employer may take race-conscious measures only when there is a "strong basis in evidence" that disparate impact liability will result if the employer does not take the race-conscious action).

[125] Primus, *Future*, *supra* note 12, at 1344.

[126] *Id.* at 1355 ("If administering the disparate impact doctrine would be a disparate treatment problem but for the statutory carve-out, it is also an equal protection problem.").

Moreover, the similarities between the disparate treatment and equal protection doctrines[127] suggest that "[a] conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection."[128] While this reading of *Ricci* appears to view traditional antidiscrimination law through a virtual looking glass,[129] recent changes in equal protection jurisprudence demonstrate the increasingly suspect nature of any policy or statute "that places people in racial categories and measures liability in part by reference to the allocation of . . . opportunities among those racial groups."[130] Specifically, the Supreme Court's rulings in *City of Richmond v. J. A. Croson Co.*,[131] *Adarand Constructors, Inc. v. Pena*,[132] and *Gratz v. Bollinger*[133] show that equal protection has become less tolerant of government actions that classify individuals by race and allocate benefits on that basis, even when such action is intended to remedy past discrimination.[134] Thus, assuming that "the war between disparate impact and equal protection will be waged sooner or later . . . it behooves us to begin thinking about how—and on what terms—to make peace between them."[135] In order to forge this peace, it may first be necessary to examine the potential sources of conflict.[136]

[127] *See id.* at 1363 (explaining that the prevailing view is that Title VII is race conscious while equal protection is "colorblind").

[128] *Id.* at 1344.

[129] *See* Primus, *Round Three*, *supra* note 15, at 495 (recognizing that the possibility "that equal protection might affirmatively *prohibit* the use of statutory disparate impact standards departs significantly from settled ways of thinking about antidiscrimination law." (emphasis added)).

[130] *Id.* at 496.

[131] 488 U.S. 469, 511 (1989) (plurality opinion) (invalidating a municipal program which allocated benefits disproportionately to minority subcontractors).

[132] 515 U.S. 200, 227 (1995) (emphasizing the Fourteenth Amendment's focus on the individual, not groups, as the proper unit of analysis).

[133] 539 U.S. 244 (2003) (striking down an undergraduate affirmative action policy where race was an overwhelming factor in admissions decisions).

[134] Primus, *Round Three*, *supra* note 15, at 496.

[135] Ricci v. DeStefano, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring); *see also* Primus, *Future*, *supra* note 12, at 1355 (noting that because "Title VII, as a statute, must give way to the Constitution," the statutorily-derived exception that saved disparate impact doctrine from conflict with disparate treatment doctrine will not save disparate impact from a constitutional challenge, which means that "some other defense" of disparate impact doctrine must be found).

[136] *See* Marcus, *supra* note 104, at 10 (separating the conflict into three categories: racial classification, illicit motives, and racially allocated benefits).

1. Disparate Impact Encourages Government Actors to Classify Based on Race

At its most basic level, the Court's decision in *Ricci* demonstrates that disparate impact doctrine may cause employers and housing providers "driven by compliance concerns to classify their employees and candidates by race [and allocate benefits on that basis] in order to avoid the prospect of disparate-impact liability."[137] The constitutional conflict that arises from this situation is most obvious where the affected employer or housing provider is itself a government entity,[138] as the Supreme Court has repeatedly held that any federal or state action that classifies individuals based on race is presumptively unconstitutional.[139] Thus, one source of conflict between disparate impact and equal protection is the untenable position of government entities seeking to avoid both disparate impact and equal protection liability.

However, under this formulation, the constitutional conflict between disparate impact and equal protection becomes virtually non-existent in cases involving private employers or housing providers, whose actions are, by definition, outside the reach of equal protection.[140] Under this view, a private employer's acts of intentional discrimination, taken for purposes of avoiding violating Title VII,[141] would not give rise to a constitutional cause of action, and a court could avoid the issue altogether.

However, the conflict between disparate impact and equal protection may nonetheless extend to cases involving private defendants, as disparate impact doctrine may itself constitute a "racial classification." Under such an analysis, a constitutional conflict would exist regardless of whether the defendant is a private or

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[137] *Id.* at 10–11 (noting that this risk is greatest in cases where it is cheaper for an employer or housing provider to use racial preferences than to adjust policies which produce the discriminatory effects complained of); *see also* SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 4 (3d ed. 2008) (noting that economically rational business owners who "otherwise would be inclined to minimize unfair practices do not in fact do so because of the costs of controlling prejudiced or arbitrary agents").

[138] *See, e.g.*, *Ricci*, 129 S. Ct. 2658 (employer was the City of New Haven, Connecticut).

[139] Such race-based classifications can only survive if narrowly tailored to serve a compelling interest. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (state government action); Korematsu v. United States, 323 U.S. 214 (1944) (federal government action).

[140] *See* U.S. CONST. amend. XIV, § 1 ("No *State* shall . . . deny to any person in its jurisdiction the equal protection of the laws." (emphasis added)).

[141] In light of the *Ricci* premise, such an employer would remain free of any liability if she could prove, by a strong basis in evidence, that disparate impact liability would result but for the discriminatory actions.

governmental entity, as the conflict would stem from Congress's impermissible use of race in enacting a statute containing a disparate impact provision.

2. Disparate Impact Is a Racial Classification in and of Itself

If the existence of a racial classification could be based on statutory language alone, it would be difficult to argue disparate impact doctrine is itself a racial classification.[142] In contrast to the affirmative action programs in *Adarand* and *Croson*, neither Title VII nor Title VIII explicitly names particular racial groups.[143] However, a more proper understanding of the concept of express classifications recognizes that formal statutory language is not determinative as to whether a statute in fact operates as a racial classification.[144] For example, in 2001, the D.C. Circuit struck down an FCC regulatory scheme that required broadcast licensees to institute employment outreach measures, and to report the race and sex of each job applicant to the FCC.[145] Upon determining that the rule placed "official pressure upon [private] broadcasters to recruit minority candidates," the court held that the rule constituted "a race-based classification that is not narrowly tailored to support a compelling governmental interest."[146] As Richard Primus observes, this decision reflects the notion that courts facing a statute that seems "constitutionally problematic" will often "reason[] backwards" to determine that some portion of the statute constitutes an express classification.[147]

In light of this interpretation of the "express classification" doctrine, even if disparate impact statutes do not explicitly classify individuals based on race, courts could nevertheless interpret them as

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[142] Primus, *Round Three*, *supra* note 15, at 508 ("Whether anything [in the language of Title VII] amounts to an express classification is a difficult question to answer.").

[143] In Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the state gave contractors incentives to hire minority-owned subcontractors and based the status "minority owned" on racial classifications. In City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (plurality opinion), the state required that 30% of a contractor's subcontractors be owned by "Blacks, Spanish -speaking, Orientals, Eskimos, or Aleuts." *Id.* at 478.

[144] Primus, *Round Three*, *supra* note 15, at 509.

[145] MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001) ("[W]e hold that [the rule] violates the equal protection component of the Due Process Clause of the Fifth Amendment.").

[146] *Id.* at 15. Like Title VII and Title VIII, the rule never mentioned specific racial groups.

[147] Primus, *Round Three*, *supra* note 15, at 509. Primus does not suggest that such courts are acting improperly. Instead, he suggests only that "'express racial classification' functions as a term of art that encompasses a mix of descriptive and normative elements" instead of relying on formal statutory language. *Id.*

express racial classifications that violate equal protection. In light of *Ricci*, it has become apparent that disparate impact places the same "pressure" on third parties to allocate resources based on race as the FCC regulation in *MD Broadcasters*. In this respect, courts could easily conclude that the disparate impact provisions of Title VII and Title VIII constitute "express racial classifications," such that a constitutional conflict exists regardless of the private or governmental nature of the decision maker in a given case.

III. BEYOND THE LOOKING GLASS: THE SURVIVAL OF DISPARATE IMPACT

Despite these conflicts between disparate impact and equal protection, the Court's decision in *Ricci* need not signal the death of disparate impact doctrine. Rather, the two doctrines may be reconciled, depending on how the courts interpret *Ricci* and how they frame disparate impact doctrine in the future.[148] Unless the Supreme Court is willing to completely invalidate disparate impact on constitutional grounds, it will be forced, sooner rather than later, to find a compromise between the two doctrines. Regardless of the ultimate outcome of this debate, the need for such an agreement may offer valuable guidance for courts and scholars seeking to determine the most useful test for disparate impact under Title VIII.

A. Disparate Impact and Strict Scrutiny

At its most basic level, the conflict between disparate impact and equal protection centers on the race-conscious nature of disparate impact statutes, and the pressure it places on employers and housing providers to take race-conscious measures that the Constitution would otherwise prohibit. In this respect, the disparate impact creates racial classifications (both directly and indirectly) and allocates benefits on that basis.[149] Because equal protection subjects such classifications to strict scrutiny, it is possible that disparate impact will only survive if the Court holds that statutory prohibitions on disparate impact satisfy strict scrutiny review.[150]

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[148] *See* Primus, *Future*, *supra* note 12, at 1363, 1369. Primus proposes three potential readings of *Ricci*, including the "general reading," the "institutional reading," and the "visible victims reading." *Id.* at 1362. According to Primus, if either of the latter readings prevail, disparate impact may be directly reconciled with equal protection. However, under the "general reading," equal protection may only be saved by recognition of a compelling government interest. *Id.* at 1363.

[149] *See supra* Part II.B.

[150] *See* Primus, *Future*, *supra* note 12, at 1374–75 (describing methods by which disparate

While strict scrutiny was once thought to be "strict in theory, but fatal in fact,"[151] the Court disproved of this characterization in *Grutter v. Bollinger*[152] by upholding the University of Michigan Law School's admissions policy. Despite the race-conscious nature of the policy, the Court found student body diversity to be a compelling state interest, at least "in the context of higher education," where inclusion of different views and backgrounds is crucial to the learning experience.[153]

The *Grutter* decision thus provides strong support for the idea that certain race-conscious measures are constitutionally permissible, so long as they are narrowly tailored to serve a compelling government interest. This notion, when coupled with the *Ricci* premise,[154] further suggests that one way to reconcile disparate impact with equal protection is to find that disparate impact doctrine serves a compelling government interest, and is narrowly tailored to achieve that end.[155] Such an approach is consistent with the Court's analysis in *Ricci*, as it would effectively "carve out" disparate impact as the exception to equal protection's prohibition on racial classifications, just as the Court "carved out" an exception to the disparate treatment doctrine. Thus, even if *Ricci* is interpreted as recognizing a direct conflict between disparate impact and equal protection,[156] disparate impact may still survive if such an interest exists.[157]

impact can survive a strict scrutiny analysis based on equal protection). However, Primus suggests that this proposition should only apply if the "general reading" of *Ricci* prevails. If an alternate reading prevails, however, disparate impact may not need to satisfy strict scrutiny in order to survive a constitutional challenge. *Id.*

[151] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 507 (1980)).

[152] 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action admissions policy as narrowly tailored to serve a compelling state interest).

[153] *Id.* at 328.

[154] The "*Ricci* premise" recognizes that disparate impact doctrine operates as an exception to the disparate treatment doctrine, thus saving disparate impact doctrine from a potential conflict with Title VII's prohibition on disparate treatment. *See* Primus, *Future*, *supra* note 12, at 1384.

[155] *See id.* at 1375 (proposing that the equal protection problem may be "parried by showing that the doctrine is narrowly tailored to a compelling governmental interest").

[156] This is what Primus describes as the "general reading" of *Ricci*. Primus, *Future*, *supra* note 12, at 1363. Under the "general reading" of *Ricci*, disparate impact doctrine conflicts with equal protection by forcing racial classifications and allocation of benefits based on group membership, which equal protection forbids. Primus also proposes two alternative readings of *Ricci*. *Id.* at 1364–74. Under the "institutional reading," and the "visible victims reading," disparate impact and equal protection would not conflict, even absent a compelling government interest. *Id.* at 1374–75.

[157] *Id.* at 1384–85 (Title VII's prohibition on practices that produce a disparate impact will be constitutional if the Court concludes that they are narrowly tailored to serve a compelling

B. Compelling Government Interests

If disparate impact is to survive within a strict scrutiny framework, questions arise over what compelling interests, if any, may justify a government measure designed to force certain racial classifications. While the Court has recognized that promotion of diversity may be a compelling state interest,[158] it has not recognized this interest outside the context of higher education. Moreover, because the admissions policy upheld in *Grutter* considered "a far broader array of qualifications and characteristics of which racial or ethnic origin [was] but a single though important element,"[159] the Court might be less likely to recognize "an interest in simple ethnic diversity."[160] However, several authors have suggested that *Grutter's* emphasis on society's need for citizens familiar with a wide variety of diverse viewpoints may be transferred outside the higher education context.[161] One commentator has also suggested that the *Grutter* rationale may apply in a residential context as well.[162] Still, whether courts will extend *Grutter* beyond the college admissions context remains unclear,[163] and even under such an extension, race could not be the only consideration.[164]

In the event that a government's interest in diversity cannot justify disparate impact, it may be able to advance two alternative compelling interests.[165] These include an interest in ferreting out instances of intentional discrimination (the "evidentiary interest"),

government interest).

[158] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) ("The freedom of a [state] university to make its own judgments as to education includes the selection of its student body.").

[159] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting *Bakke*, 438 U.S. at 315).

[160] *Id.* at 324 (quoting *Bakke*, 539 U.S. at 315).

[161] *See* Adam Gordon, *Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market*, 24 YALE L. & POL'Y REV. 437, 463 (2006) (citing Cynthia E. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005)) (considering how *Grutter* might apply beyond the academic context); Eric A. Tilles, *Lessons from* Bakke*: The Effect of* Grutter *on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451 (2004) (discussing *Grutter*'s effects on affirmative action); Jessica Bulman-Pozen, Note, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L. J. 1408 (2006) (using Title VII to evaluate *Grutter*).

[162] Gordon, *supra* note 161, at 463 (citing Josh Whitehead, *Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L. J. 359, 395 (2005)).

[163] *Id.*

[164] *See Grutter*, 539 U.S. at 336–37 (holding that universities may consider race as one of many factors when making admissions decisions, but that it may not be the exclusive factor).

[165] Primus, *Future*, *supra* note 12, at 1368–75.

and an interest in complying with federal antidiscrimination statutes, including Title VII and Title VIII (the "compliance interest").[166] While the compliance interest may only be useful in defending the race-conscious actions taken by governmental entities in an effort to avoid disparate impact liability, the evidentiary interest may be sufficient to save disparate impact doctrine as a whole from constitutional invalidation.[167]

However, if disparate impact is to be justified by this evidentiary interest, it must be narrowly construed. At least one critic has argued that disparate impact is only compatible with equal protection when it is construed as a means of rooting out instances of intentional discrimination.[168] Therefore, while disparate impact has been construed as both an evidentiary tool designed to "root out" intentional discrimination and a mechanism to remedy the effects of *past* discrimination,[169] the doctrine is most likely to be justified by a compelling government interest when viewed as an "evidentiary dragnet."[170] While the Supreme Court has already rejected the notion that redressing general trends of past discrimination could serve as a compelling government interest,[171] the government's interest in preventing intentional discrimination "seems compelling as a consensus matter."[172] As Richard Primus observed pre-*Ricci*, "[a]dopting an [evidentiary dragnet] interpretation . . . would help preserve disparate impact doctrine against an equal protection attack by making it conform to the presentist, individualist approach that increasingly typifies equal protection itself."[173]

The evidentiary dragnet view of disparate impact, while less ambitious than views that treat the doctrine as a remedy for past

[166] *Id.*

[167] *Id.* at 1375–76. Primus notes that if the general reading of *Ricci* prevails, recognition of a compelling evidentiary interest is the disparate impact doctrine's only chance for survival. *Id.*

[168] *See* Marcus, *supra* note 104, at 3 (arguing that Title VII must be narrowed to exclude disparate impact or must be struck down as unconstitutional).

[169] Primus, *Round Three*, *supra* note 15, at 520–21. Under the "evidentiary dragnet" view of disparate impact, Title VII and Title VIII are mainly concerned with punishing instances of present, intentional discrimination. In contrast, proponents who view disparate impact as a means of remedying past discrimination argue that the doctrine is equally, if not more, concerned with breaking down the racial hierarchies that have resulted from past discrimination. *Id.*

[170] Primus, *Future*, *supra* note 12, at 1375–76.

[171] *See* City of Richmond v. J. A. Croson, 488 U.S. 469, 499 (1989) (plurality opinion) ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

[172] Primus, *Future*, *supra* note 12, at 1377.

[173] Primus, *Round Three*, *supra* note 15, at 499.

discrimination,[174] finds support in a number of sources, including the Supreme Court's original disparate impact decision.[175] In *Griggs*, the defendant employer had a history of openly discriminating on the basis of race, only permitting black employees to work in the Labor Department, which paid the lowest out of all five departments within the company.[176] Following Congress's passage of the 1964 Act, however, the employer eliminated this overtly discriminatory practice, and instead adopted a policy of requiring a high school education for applicants seeking promotion from the Labor department.[177] The company also instituted a policy requiring that initial applicants and candidates for promotion obtain a minimum score on an achievement test. While facially neutral, the Court struck down these policies, noting that they effectively carried out the employer's previous discriminatory policy; neutrality was simply a guise.[178]

The facts of *Griggs* suggest that the Supreme Court first recognized disparate impact doctrine in an effort to impose liability where the discriminatory acts were almost certainly intentional, but where such intent was impossible to prove. *Griggs* also shows that given the difficulties of proving discriminatory intent, disparate impact doctrine is necessary as a means of uncovering and imposing liability for discriminatory motives,[179] particularly where defendants use practices that appear facially neutral in order to achieve a discriminatory goal.[180] During the early developments of antidiscrimination law, "prohibitions against [only] intentional discrimination could not address the more subtle forms of

[174] *See* Primus, *Future*, *supra* note 12, at 1378 (explaining that the evidentiary dragnet view is only a temporary solution to challenges against disparate treatment claims).

[175] Griggs v. Duke Power Co. 401 U.S. 424 (1971).

[176] *Id.* at 427 (noting that the highest paying jobs in the Labor Department paid less than the lowest paying jobs in the other four departments, where only whites were permitted to work).

[177] *Id.* The company also had an existing policy which required a high school education for initial assignment to any department other than Labor. *Id.*

[178] *Id.*

[179] Primus, *Round Three*, *supra* note 15, at 519. As Primus observes, this view of disparate impact parallels the constitutional principle that strict scrutiny review serves as a means of "smok[ing] out" the legislature's true intent in taking measures that create racial classifications. *Id.* at 520 n.113 (citing City of Richmond v. J. A. Croson, 488 U.S. 469 (1989) (plurality opinion)).

[180] *See* Elliot M. Mincberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 151 (1976) (noting that "only the careless landlord or employer who wishes to discriminate will leave clues" as to their true motive); *see also* United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) ("[C]lever men may easily conceal their [discriminatory] motivations.").

discrimination that grew up in their place."[181] The fact that courts today rarely grant relief against a defendant without a suspicion of discriminatory intent further supports the conclusion that intentional discrimination is indeed the real focus of disparate impact,[182] and that a proper formulation of the doctrine under Title VIII should reflect that concern.

C. Narrow Tailoring: Searching for a Perfect Fit

Assuming that disparate impact serves a compelling government interest in detecting and deterring intentional discrimination, questions still remain over whether the racial classifications embodied within the doctrine[183] can be "narrowly tailored" to serve that interest. In the context of racial classifications, narrow tailoring requires "the most exact connection" between the race-conscious measures and the compelling government interest.[184] Moreover, a statute cannot be over- or underinclusive in terms of the conduct it reaches, and the existence of nondiscriminatory alternatives seriously undercuts its legitimacy.[185] This section will illustrate how a balancing test formulation of disparate impact can cause the doctrine to be both overinclusive—imposing liability where it may be undue under the evidentiary dragnet view of disparate impact—as well as underinclusive—often failing to reach conduct that *should* raise a presumption of discriminatory intent.

Further, this section will illustrate the main thesis of this Note: if disparate impact must survive strict scrutiny in order to withstand the constitutional conflict presented by a general reading of *Ricci*, then a burden-shifting analysis is the most appropriate formulation of disparate impact. The burden-shifting test, including the timing and weight of the evidentiary burdens it places on both plaintiff and defendant, is crucial to ensuring that Title VIII's disparate impact provisions are narrowly tailored to serve the government's interest in "smoking out" intentional discrimination. For the purposes of maintaining cohesion between disparate impact under Title VIII and

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[181] Rutherglen, *Equality*, *supra* note 33, at 2328.

[182] *See* Primus, *Round Three*, *supra* note 15, at 520 ("The fact that an adjudicating court does not enter a finding of intentional discrimination does not eliminate the possibility that intent is the doctrine's real concern . . . .").

[183] *See supra* Part II.B.2 (discussing disparate impact as a racial classification).

[184] Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (describing racial classifications as "too pernicious" to permit anything less than this close connection).

[185] *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 506 (1989) (plurality opinion) (noting that in order to be narrowly tailored, a racial classification cannot be overly restrictive).

the principles of equal protection, a burden-shifting analysis is preferable to the balancing test, as it may reduce the pressure on housing providers to take race-conscious measures in order to avoid disparate impact liability. Moreover, the burden-shifting test's high evidentiary standards will better enable courts to determine the true motives behind a defendant's actions, and to impose liability only when a discriminatory motive is indicated.

1. Problems with the Balancing Test

Despite the merits of the balancing test for disparate impact,[186] its continued application in Title VIII cases may prevent disparate impact doctrine from satisfying the "narrowly tailored" requirement of strict scrutiny. For instance, because the balancing test "attempt[s] to encapsulate in four simple questions all of the factors that should influence the outcome of a Title VIII case," it often fails to capture the strength or importance of each party's interest.[187] For instance, while the third factor is said to measure the "defendant's interest in the action," it considers only the nature (legitimate or illegitimate) of a defendant's interest, while ignoring the strength of that interest.[188] This factor also favors government over private interests, making it difficult for defendants—particularly private entities—to defend themselves, even when strong interests are involved. As a result, defendants with a strong legitimate interest in taking some action may have little hope of defending a successful prima facie case, which may in turn increase defendants' motivation to adopt the type of "prophylactic measures" which gave rise to the controversy in *Ricci*.

An additional problem with the balancing test is its treatment of the remedy a plaintiff seeks as relevant to the merits of a claim. Under the fourth factor articulated in *Arlington Heights I*, courts must consider whether the plaintiff is seeking to compel the defendant to affirmatively provide housing or simply to remove obstacles to access existing housing.[189] This focus on the remedy is an "improper consideration[] in the disparate impact context,"[190] where the harm inflicted (lack of access to housing) is the same, regardless of the

[186] *See supra* Part II.

[187] Stick, *supra* note 64, at 410.

[188] *Id.* at 411.

[189] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (*Arlington Heights I*), 429 U.S. 252 (1977). This factor weighs against plaintiffs who seek to compel defendants to affirmatively provide housing.

[190] Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin 885 N.E.2d 1274, 1282 (Ind. 2008).

remedy being sought. Moreover, because the fourth factor favors cases brought by private developers who seek to construct housing over those brought by prospective residents of such housing, the majority of successful cases against government defendants involve challenges to zoning ordinances that produce a discriminatory effect.[191] The significance of this phenomenon lies in the fact that unlike many situations that arise in the employment context, many defendants in the housing context may have limited ability to grant meaningful relief.[192] For instance, even where relief is granted against a municipality whose zoning ordinance produces a discriminatory effect, minorities may still be excluded from housing in a given area, because private sellers and landlords retain the ultimate power to grant or deny access to housing. By favoring cases where judicially granted remedies may have little practical effect on disadvantaged groups, racial inequalities in housing may continue despite a court's imposition of liability under the balancing test standard.[193] By causing a disconnect between the harm inflicted and the implementation of an appropriate remedy in this manner, a balancing-test version of disparate impact under Title VIII may prevent the doctrine from efficiently serving any compelling governmental interest.

Finally, a number of developments have taken place in the housing market since the *Arlington Heights II* and *Huntington* decisions, creating a possibility that the balancing test no longer reflects the realities of the housing market.[194] If this is the case, it may skew a court's estimate of a practice's impact on minority groups. For instance, courts applying the balancing test must evaluate the effects of a defendants' practice by measuring what proportion of a given group will be adversely affected by that practice. In making this determination, courts often focus on income level as a proxy for an individual's ability to access housing. In this respect, the balancing test assumes that if housing is made available to all persons of a given income level, it will be allocated randomly among those people, regardless of race.[195] However, in recent decades, family wealth has become an increasingly prevalent factor in the homeownership market, and the importance of credit checks has risen significantly in

[191] Gordon, *supra* note 161, at 451–52.

[192] *Id.* (noting that defendant employers often have direct authority to implement a remedy, such as using a different test or different employment criteria).

[193] *Id.* at 439 ("[E]ven once a remedy is formulated in a Title VIII case, the actual achievement of racial desegregation often remains in question.").

[194] *Id.* at 448.

[195] *Id.*

both the rental and homeownership markets.[196] Studies have shown, however, that members of minority groups tend to have lower credit scores than whites, and are less likely to receive financial assistance from family members when purchasing a home.[197] Therefore, because a test that focuses on income alone will fail to measure the relative disadvantage that members of minority groups will face in accessing suitable housing, courts are likely to underestimate the disproportionate impact of a given housing practice on minority applicants.[198] This creates a risk that courts will dismiss cases where the impact of a defendant's conduct—if properly measured—*would* raise a presumption of intentional discrimination. In such instances, disparate impact doctrine and the racial classifications it creates will fail to achieve the desired remedy of uncovering intentional discrimination, and therefore will not meet strict scrutiny's narrow tailoring requirement.

2. The Burden-Shifting Test and Evidentiary Standards

As discussed in Part II, one of the main sources of conflict between disparate impact and equal protection is the possibility that employers and housing providers will adopt race-conscious quota systems and other "prophylactic" measures in order to avoid disparate liability.[199] To make matters worse, a formulation of disparate impact that fails to capture the defendants' interests (i.e., the balancing test) increases the likelihood that courts will impose liability on undeserving defendants.[200] With little chance of defending their actions under a system which fails to appreciate their interests, potential defendants will be pressured to take race-conscious measures, such as throwing out valid employment tests,[201] to avoid the possibility that a plaintiff could bring a disparate impact claim in the first place. However, as Justice O'Connor suggested nearly 20 years ago, evidentiary mechanisms, including the prima facie case and proper allocations with respect to burdens of proof, may

[196] *Id.* (citing John J. Ammann, *Housing Out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 316–18 (2000)).

[197] *Id.* at 450–51.

[198] *See id.* at 449 ("[T[he income-centered analyses . . . likely overstate the number of blacks who will receive housing . . . .").

[199] *See supra* Part II.

[200] *See supra* Part III.C.1.

[201] *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

significantly reduce this "pressure . . . to adopt inappropriate prophylactic measures."[202]

Therefore, to the extent that the conflict between disparate impact and equal protection parallels the degree to which it encourages such measures, courts may be able to reduce one of the greatest points of conflict between disparate impact and equal protection by adhering to a test that employs these mechanisms. Because the burden-shifting analysis satisfies this need, courts addressing Title VIII claims would be well advised to adopt it as the proper test for the following reasons.

First, by requiring plaintiffs to make out a full prima facie case before imposing any burden on the defendant, the burden-shifting standard reduces the pressure on defendants to adopt prophylactic measures as a means of avoiding disparate impact liability. While the balancing test operates less sequentially, requiring the defendant to incur costs from the beginning, the burden-shifting analysis ensures that the defendant will not incur significant litigation costs until after the plaintiff has made out a prima facie case. Therefore, in cases where a plaintiff fails to make out a prima facie case, the suit will be dismissed without any showing required from the defendant. By conditioning the defendant's burden on the plaintiff's initial success in this manner, the burden-shifting analysis should give defendants a greater sense of security against the threat and costs associated with defending frivolous claims. This security may in turn reduce the pressure on housing providers to adopt quota systems or other race-conscious measures, thereby minimizing a major source of conflict between equal protection and disparate impact.

Further, unlike the balancing test, which often fails to capture the strength of a defendant's interest, the burden-shifting analysis gives potential defendants the opportunity to fully explain their actions, including the strength of their interests and the decision-making process they employed.[203] This opportunity, combined with the possibility that a plaintiff's case will fail before the defendant incurs any litigation costs, is more likely to assure would-be defendants that prophylactic measures are unnecessary to avoid disparate impact liability.[204] In that respect, adoption of the burden-shifting standard in Title VIII cases may also deter housing providers from taking action

[202] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (opinion of O'Connor, J.) (plurality opinion).

[203] Mincberg, *supra* note 180, at 157–58.

[204] Of course, despite the opportunity to better defend their actions, such defendants will still incur the litigation costs, unless such costs can be allocated to a third party. *See infra* Part IV.D. for further discussion on this possibility.

that would otherwise violate equal protection, keeping the doctrine in line with constitutional principles.

Finally, the burden-shifting approach to business necessity is preferable to the situation that often results under a balancing test—imposing on the plaintiff the burden and guesswork of anticipating and rejecting the possible justifications the defendant may have had. In addition to the burdens imposed on the plaintiff, courts applying the balancing approach may only infer the defendant's thought process, rather than hearing it from the defendant directly.[205] By instead placing the burden on the defendants to articulate the reasons and logic for their conduct, the burden-shifting standard allows courts to "as fairly and effectively as possible" discover "the method by which such discriminatory effects were produced, the reason that particular method was chosen by the defendant, and the legitimacy of such reasons themselves."[206] In this respect, the burden-shifting test increases the likelihood that the defendant will "produce his full story,"[207] giving courts a better understanding of the reasons (intentional or unintentional) behind practices with discriminatory effects. In serving this function, the burden-shifting analysis may more efficiently achieve the government's interest in rooting out intentional discrimination,[208] providing courts with a better indication of whether there is "something untoward about the defendant's motivations."[209] The burden-shifting test may therefore increase the chance that courts will only impose liability when it is well-deserved under the "evidentiary dragnet" view of disparate impact, thus striking "[t]he correct balance between over- and under-enforcement."[210]

IV. ADAPTING THE BURDEN-SHIFTING STANDARD TO TITLE VIII

While a burden-shifting analysis may help to align disparate impact doctrine with the goals it was designed to promote, the balance between over- and underenforcement "cannot be struck in the abstract," achievement of that balance will depend on "a pragmatic

[205] *See* Mincberg, *supra* note 180, at 157–58 ("[T]he employer or landlord can more easily isolate from among the many possible justifications the interests furthered by the allegedly discriminatory practice.").

[206] *Id.* at 157.

[207] *Id.*

[208] *Id.* at 157–58 (citing CHARLES T. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 338, 343 (E. Cleary ed., 2d ed. 1972)).

[209] Primus, *Future*, *supra* note 12, at 1378 (citing Selmi, *supra* note 2, at 716, 749).

[210] Rutherglen, *Equality*, *supra* note 33, at 2337.

assessment of what can be expected to work in different [contexts]."[211] Although Title VII's burden-shifting test provides the proper framework for evaluating Title VIII disparate impact claims, the inherent differences between the housing and employment contexts suggest that the analogy may be less than perfect with respect to the "business necessity" prong of the burden-shifting test.[212] As defendant employers are increasingly receiving greater deference from the courts, the limitations of the analogy between Title VII and Title VIII have become increasingly important.[213] This Part will explore the inherent differences between housing and employment, and will discuss how these differences warrant several important variations on the burden-shifting test when it is applied in the Title VIII context.

Specifically, this Part will propose that given the limited number of relevant considerations in decisions involving allocation of housing, Title VIII defendants should bear a higher burden than their Title VII counterparts when seeking to justify practices that produce a discriminatory result. In light of the unique and often remedial role of government entities in the housing context, this Part will demonstrate that a "compelling business necessity" standard is appropriate for government actions that produce a discriminatory effect. While these variations on the burden-shifting test do not necessarily impact whether or not the disparate impact doctrine satisfies the "narrow tailoring" requirement of strict scrutiny, they are meant to better reflect the congressional purposes behind Title VIII.[214]

A. Business Necessity: Current Applications

Like much of antidiscrimination law, the concept of "business necessity" has proven to be a source of confusion for courts in both employment and housing discrimination cases. When the Supreme Court first recognized the business necessity defense in the employment context, the Court declared that a job requirement that has a discriminatory effect may only survive if it has a "manifest relationship" to the employment in question, and fulfills a "genuine

[211] *Id.*

[212] *See id.* at 2314 (noting that context is a crucial factor in determining the weight and terms of a defendant's burden).

[213] *See* Christopher P. McCormack, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 565–66 (1986) ("For Title VIII, the limits of the analogy with Title VII are becoming more important as employers' discretion receives greater deference in Title VII doctrine.").

[214] *See infra* Part IV.C.1 (discussing congressional intent).

business need."[215] Other courts have adopted similar recitations of this test, including whether the practice is "necessary to the safe and efficient operation of the business."[216]

Regardless of the specific phrasing used, most courts consider three main factors in evaluating a business necessity defense: (1) whether the practice relates to a valid business purpose that is sufficient to override any discriminatory effects; (2) whether the practice effectively serves business operations; and (3) whether the defendant has no alternative means of achieving its business goal.[217] Most courts agree that a defendant cannot fulfill the burden by simply supplying evidence of job-relatedness,[218] but instead must present (at the very least) "convincing facts establishing a fit between the qualification and the job."[219] Thus, courts tend to construe the defense narrowly, often requiring a defendant to show that "dire economic consequences" will result from changing a practice that produces disparate impact.[220]

In the housing context, courts applying the burden-shifting analysis have also taken a variety of approaches to the nature of a defendant's burden of justification, drawing mainly from these Title VII principles. In *United States v. City of Black Jack*,[221] the Eighth Circuit imposed a heavy burden on a local government to justify a city zoning ordinance which prohibited construction of any new multi-family homes.[222] In order to justify the ordinance, which it found to have a racially discriminatory effect, the court held the city to a strict scrutiny standard similar to the test employed under equal protection jurisprudence, requiring that a practice be "necessary" to serve a "compelling governmental interest."[223] Despite the City's assertions of several interests (including traffic safety, prevention of school overcrowding, and the need to prevent devaluation of single family homes), the court refused to recognize any of these interests as sufficiently compelling, and struck down the ordinance as a violation of Title VIII.[224]

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[215] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[216] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

[217] Mincberg, *supra* note 180, at 175–76.

[218] *Id.* at 176.

[219] *See* Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972).

[220] McCormack, *supra* note 213, at 570.

[221] 508 F.2d 1179 (8th Cir. 1974) (finding that the city could not justify its practices under the business necessity standard where the practice served no compelling government interest).

[222] *Id.* at 1181–82.

[223] *Id.* at 1185.

[224] *Id*. at 1187.

In contrast to the Eighth Circuit's stringent approach, other courts have granted slightly more deference to Title VIII defendants, requiring only that a contested practice serve a "legitimate, bona fide interest," and "that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[225] In *Rizzo*, the Third Circuit also specifically noted how the differences between housing and employment might affect disparate impact analysis.[226] As the court observed, the "the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII."[227] While this observation may seem to suggest that business necessity is more easily proven in the employment context, the court did not go so far as to indicate that a lower business necessity standard would be appropriate in housing cases. Rather, as the following section will illustrate, the differences between housing and employment suggest that given the limited number of legitimate justifications for denying housing to a qualified applicant, Title VIII defendants should bear a higher burden than their Title VII counterparts when seeking to rebut a prima facie case of disparate impact.

B. Raising the Bar for Title VIII Defendants

In order to fully examine the reasons in favor of imposing a higher burden on Title VIII defendants, it is necessary to explore the types of justifications defendants commonly offer in both Title VII and Title VIII cases, especially those justifications based on applicant characteristics and the financial burdens of changing a practice that produces a discriminatory effect.[228] This section will explore how, in light of these justifications and the inherent differences between the housing and employment contexts, defendants in Title VIII cases should bear a greater burden than Title VII defendants when justifying practices that produce a discriminatory effect.[229] Where the justification is based on applicant characteristics, there are fewer

[225] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977).

[226] Mahoney, *supra* note 6, at 436.

[227] *Rizzo*, 464 F.3d at 148.

[228] *See* Mincberg, *supra* note 180, at 177 ("[These justifications] may include such subjective criteria as the absence of fellow employee or neighbor recommendations, or more objective standards such as an applicant's prior arrest record or past wage garnishment.").

[229] *See* McCormack, *supra* note 213, at 565 ("[F]ewer business considerations will suffice to support the defense of business necessity in housing than in employment").

relevant characteristics in the housing context, most of which are objective in nature. Where the justification is based on financial burden, the potential losses to private defendants are generally speculative at best, and government defendants have little room to argue that financial concerns trump more humanitarian objectives.[230]

1. Justifications Based on Applicant Characteristics

Defendants in both housing and employment contexts often seek to justify their actions based on applicant characteristics, which may range from subjective (i.e., neighbor or employee recommendations) to objective (i.e., past criminal records, history of wage garnishment) in nature.[231] For the most part, courts have held that these justifications are valid only to the extent that they reflect an applicant's ability to perform legitimate employee or tenant/purchaser obligations.[232] In the employment context, such obligations generally include the ability to perform a job safely and efficiently. Similarly, housing obligations generally include the ability to pay either rent or a purchase amount, and to maintain facilities in the case of a rental. Therefore, characteristics such as criminal records or neighbor recommendations should *not* serve as legitimate justifications, unless they help to identify characteristics related to these obligations.[233]

Of course, the differing nature of the relationships formed in the housing and employment contexts suggest that there is less room for a Title VIII defendant to justify a particular practice based on applicant characteristics. As a noted scholar in the field of housing discrimination has observed, employee-employer relationships are necessarily ongoing in nature.[234] Because these relationships often require an employee to have specific knowledge and experience related to the employer's line of work and method of doing business, employers must often consider a wide array factors that relate to effective job performance, from obvious qualifications like education and training, to more subtle requirements such as height and weight, which may relate to productivity in certain contexts.[235] In short, an

[230] *See* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 119 (5th Cir. 1973) (arguing that financial concerns should yield to more compassionate objectives in the housing context).

[231] *See* Mincberg, *supra* note 180, at 177–78.

[232] *Id.* (noting that requirements should be limited to essential obligations such as the ability to pay rent or maintain the property).

[233] *Id.*, at 178.

[234] Schwemm, *supra* note 43, at 235.

[235] Mincberg, *supra* note 180, at 177–78; *see also* McCormack, *supra* note 213, at 567 (observing that in the housing context, "fine points of skill, education and the like are not

"employer has broad areas of legitimate concern; a decision to hire creates a relationship in which highly diverse considerations of safety, efficiency, and the worker's skill can be important."[236] In such cases, courts may be ill equipped to evaluate the legitimacy of the employer's unique and specialized considerations, and may be less willing to interfere with business efficiency and productivity.[237]

In contrast, the concerns faced by housing providers tend to be more limited in scope and more objective in nature.[238] While certain housing transactions, such as the rental of an apartment, create an ongoing relationship between the landlord and tenant, others, such as the sale of a home, end at the point of closing. In these situations, very few factors are relevant in terms of what constitutes a "desirable" renter or buyer, as a seller or lessor's main consideration is the applicant's ability to pay the desired price.[239] Because this consideration is an easily quantifiable "applicant characteristic," courts are better equipped to evaluate the legitimacy of a landlord's or seller's practices, and may be less willing to defer to a defendant's decision-making discretion.[240] Indeed, the consequences of selecting an unqualified candidate are likely to be more severe in an employment context,[241] suggesting that judicial deference to the defendant's judgment is less warranted in the housing context.[242]

2. Justifications Based on Financial Burden

In addition to applicant characteristics, defendants in disparate impact cases often seek to justify their practices on the ground that changing those practices will impose financial burdens on the defendants' business operations.[243] For instance, employers may point to the costs of developing new aptitude tests that do not produce

critical, if important at all").

[236] McCormack, *supra* note 213, at 566.

[237] *See id.* (noting that while Title VII contains several exemptions which reflect Congress's intent to minimize interference with an employer's business operations, Title VIII contains no such exceptions).

[238] *Id.*

[239] *Id.* at 566–67. Of course, in a rental situation, the lessor may also be concerned with other factors, such as the potential renter's ability to maintain the premises.

[240] *Id.* at 565–66. McCormack also notes that "[t]he concept of business necessity . . . cannot raise many issues of legitimate concern" for housing providers. *Id.* at 602.

[241] Schwemm, *supra* note 43, at 235 (quoting Mincberg, *supra* note 180, at 174).

[242] Mincberg, *supra* note 180, at 174 ("Indeed, in housing, the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot.").

[243] *Id.* at 178.

discriminatory results, or to the costs associated with training employees who do not have the skills or knowledge that were previously required under a policy that produced discriminatory effects. While the magnitude of these burdens may be subject to debate, one thing is certain: the costs associated with changing a business practice are almost certain to accrue once relief is granted against an employer.

Housing providers may also argue that changing a business practice will would create a financial burden to the landlord, such that maintenance of the practice serves a "business necessity."[244] To illustrate, many private landlords use a potential tenant's credit score as a selection criteria designed to measure the tenant's risk of default.[245] Because minority applicants statistically have lower credit scores than white applicants, such practices may produce a discriminatory effect.[246] While a landlord may seek to justify this practice on the ground that changing the policy would expose her to a greater risk of renter default, such a financial burden (assuming it materializes at all) is far less immediate than those which are likely to result from changing an employment practice.[247] As a result, courts are less likely to sympathize with the housing provider who asserts such a defense, thus increasing the burden on Title VIII defendants.

Additionally, in the context of government-subsidized housing, where potential defendants often play a remedial role,[248] justifications based on financial burdens are even less persuasive. While financial concerns are of great importance to private and governmental employers alike, government housing providers and regulators will find it difficult to justify their practices based on financial concerns alone.[249] Unlike governmental employers, government regulators and

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[244] *See e.g.*, Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975) (holding that a landlord who required potential tenants to have a weekly income equal to 90% of the monthly rent, or have a third party guarantee rent payments was permissible), *called into question by* Huntington Branch, NAACP. v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) ("[E]ven if the views expressed in *Lefrak* still apply in a Title VIII case against a private defendant, a matter of considerable uncertainty, the disparate impact approach of Title VII cases is fully applicable to this Title VIII case brought against a public defendant.").

[245] *See* Gordon, *supra* note 161, at 448–49 ("In both the rental and homeownership markets, credit checks play a major role in housing allocation.").

[246] *See id.* (discussing data demonstrating the lesser credit scores of minorities compared to those of whites and the resultant disadvantage posed in obtaining housing).

[247] Unlike the definite costs associated with changing an employment practice, the possibility of renter default is only a risk, and not certain to impose a burden on the housing provider.

[248] See *infra* Part IV.C.2 for a further discussion of government entities' remedial roles in the housing context.

[249] *See infra* Part IV.C.1 (discussing the inadequacy of "cost-minimization" as a legitimate

housing providers do not have the same money-making interests as a private entity, and are even less justified in citing financial burdens as legitimate concerns.[250]

C. How Heavy a Burden?

Having established that Title VIII defendants should bear a heavier burden in justifying practices that produce discriminatory effects, the question thus becomes how heavy a burden to impose, and whether that burden should be applied uniformly to both government and private defendants.

1. Private Defendants and "Intermediate Scrutiny"

In discussing the appropriate burden to place upon Title VIII defendants, one commentator has suggested that an "intermediate standard" of review "similar to equal protection intermediate scrutiny" may be the most appropriate form of analysis, particularly for private defendants.[251] While a more lenient standard—particularly one that would justify a discriminatory effect whenever a "legitimate" goal was at stake—would defeat the Congressional goals behind Title VIII altogether,[252] a stricter standard would create an insurmountable obstacle for private defendants seeking to justify their practices.[253] Therefore, in light of the difficulties associated with these more "extreme" versions of a business necessity test, "[s]ome form of intermediate standard of review is necessary."[254]

Adoption of an intermediate standard also follows logically from the idea that the "business necessity" analysis commonly employed in Title VII cases mirrors the "rational basis" review employed in equal protection cases.[255] Thus, if Title VIII defendants are to bear a higher

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interest in the housing context).

[250] *See infra* Part IV.C.2 (discussing the unique role of government entities in the housing context).

[251] *See* Stick, *supra* note 64, at 428–29 & n.146 (noting that the choice of a proper test for Title VIII claims is between the balancing test and an "intermediate absolute test"). Stick uses the term "absolute standard" as a catch-all for the various forms of the burden-shifting analysis that courts have applied in disparate impact cases. *See id.* at 408, 417.

[252] *Id.* at 426–27 ("Congress intended housing practices with discriminatory effects to be permitted only if strongly justified.").

[253] *See id.* at 425–26 (noting that absent a compelling interest, "almost every [private] action that produces a discriminatory effect would be found to be a violation of Title VIII").

[254] *Id.* at 428.

[255] *See id.* at 426 (noting that cost minimization often satisfies Title VII's "legitimate goal" requirement).

burden than their Title VII counterparts, then application of the next highest level of scrutiny should be warranted for practices that produce discriminatory effects in housing.[256] Under the "intermediate scrutiny" analysis, Title VIII defendants should be required to show that any practice producing a discriminatory effect serves an "important interest," and that no alternative practices exist.[257]

The question then arises: what, if any, interests could be sufficiently "important" to justify housing practices that produce a discriminatory effect? In Title VII cases, employers often successfully defend their practices on the basis that alternative measures would not serve the employer's cost-minimization objectives as effectively as current practices.[258] The legislative history of Title VIII, however, suggests that "[i]f a practice with discriminatory effects could be justified whenever it costs less than the alternatives, [Title VIII] would be meaningless."[259] Because Congress's goal in enacting Title VIII was to achieve "'truly integrated and balanced living patterns,'"[260] Title VIII was intended to combat more than discrete acts of discrimination in actual sales or rentals of housing, and was "seen as an attempt to *alter the whole character* of the housing market."[261] In light of these ambitious goals—which arguably go further than Congress's goals in enacting Title VII[262]—it would be difficult to argue that Congress intended for a housing provider's interests in "cost minimization" to outweigh the importance Congress placed on integrated housing patterns.

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[256] In equal protection jurisprudence, intermediate scrutiny serves as the "middle ground" between rational basis and strict scrutiny review. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210–11 n.* (1976) (Powell, J., concurring) (recognizing that the Court's gender discrimination analysis "will be viewed by some as a 'middle-tier' approach").

[257] *See* Stick, *supra* note 64, at 429 (observing that the "no alternative" requirement mirrors the "substantial relationship" between means and ends required under an equal protection analysis).

[258] In practice, courts often accept mere "cost minimization" as a legitimate interest for Title VII defendants. *See id.* at 426 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). The legislative history of Title VIII suggests, however, that such an interest should be insufficient to justify discriminatory effects in the housing context. *Id.*

[259] *Id.*

[260] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (remarks of Sen. Mondale)).

[261] Mayers v. Ridley, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring) (emphasis added).

[262] The purpose of Title VII "'is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'" *Griggs*, 401 U.S. at 434 (quoting 110 CONG. REC. 7247 (1964)). This language, when compared to the stated goals behind Title VIII, suggests that while Congress intended for Title VIII to accomplish a complete and perhaps long-term overhaul of the housing situation in the United States, its goals in enacting Title VII focused more on the immediate effects of adverse employment actions.

Therefore, under a business necessity test that tracks intermediate scrutiny analysis, Title VIII defendants should be required to show that a practice serves an interest greater than merely "cost minimization."[263] The question then arises: what other "interests" may be important enough to justify private housing practices that produce discriminatory effects? The Tenth Circuit's decision in *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*[264] may offer some guidance on this issue. In *Mountain Side*, the court held that a mobile home park owner's interests in avoiding problems associated with exceeding the sewer system's capacity limitations and preserving the quality of life within the park, were sufficiently important to justify the defendant's practice of limiting mobile home occupancy to three residents per home.[265] Crucial to the Tenth Circuit's ruling was its determination that the occupancy limit had "a manifest relationship to the housing in question."[266] *Mountain Side* therefore suggests that in order for an interest to be deemed "important" for purposes of business necessity analysis, it must relate to the nature of the housing at issue, and must affect the private defendant's ability to effectively provide such housing.[267] However, because the level of relatedness between a practice and the housing at issue is likely to be highly contextual, courts should conduct this inquiry on a case-by-case basis. While courts should keep a careful eye out for instances of intentional

[263] *See* Stick, *supra* note 64, at 426 (observing that the effect of a weak standard of review in Title VIII cases is an ability of defendants to present cost minimization as a legitimate goal). An exception to this rule should be made in cases where a defendant would suffer "dire economic consequences" if forced to change his practices. *See* McCormack, *supra* note 213, at 570 (discussing the rigorous standard the courts have applied to determine whether business necessity is a sufficient defense to overcome disparate impact). While avoidance of such hardship would understandably qualify as an important interest—particularly where the hardship could lead to the downfall of the defendant's entire business—a defendant's interest in raising his income marginally should be outweighed by a plaintiff's interests in fair housing.

[264] 56 F.3d 1243 (10th Cir. 1995). While at first glance the Tenth Circuit appears to apply the *Arlington Heights II* balancing test, the court in fact conducts a burden-shifting analysis in determining that the defendant's showing of "business necessity" successfully rebutted the plaintiff's prima facie case. *Id.* at 1253.

[265] *Id.*

[266] *Id.* at 1254. As the court noted, an "insubstantial justification in this regard will not suffice, because such a low standard would permit discrimination to be practiced through the use of spurious, seemingly neutral practices." *Id.*

[267] Under this analysis, practices related to financial concerns could still arguably qualify as "important." For instance, a private homeowner's association that requires monthly homeowner's fees could potentially justify its practice, despite any discriminatory effects it produces, on the basis that fees are essential to the association's ability to provide the type of living conditions that residents seek and expect in that type of housing, thus creating a relationship between the practice and the housing at issue.

discrimination masquerading as a legitimate practice, their application of the burden-shifting standard should alleviate this concern.[268]

2. Government Defendants and "Compelling Business Necessity"

While courts generally apply Title VII's business necessity standard uniformly to both public and private defendants, courts addressing Title VIII claims have recognized the unique role of government entities in the housing context, and have developed different business necessity standards for public and private entities.[269] Although government and private employers perform virtually identical roles, the roles of government and private entities differ significantly in the housing context. As a result, many of the roles served by government entities in the housing context have no parallel in the context of employment.[270]

In the housing context, government entities often regulate third parties through zoning ordinances and permit policies. In this respect, a potential defendant functions solely as a government entity by performing a duty for which private entities have no authority. However, government entities may also engage in housing-related activities that parallel those of a private entity, including administration of low-income housing programs.[271] However, in light of the remedial nature of these activities, government defendants in the housing context do not have the same moneymaking interest as private landlords or developers. Government housing providers also differ from government employers in this respect, as government employers have a valid interest in generating revenue.[272] Because "success" of an operation is not as easily quantifiable where money is not a consideration, government defendants in housing cases should

[268] *See supra* Part III.C.2.

[269] *See, e.g.*, Betsey v. Turtle Creek Assoc., 736 F.2d 983, 988 n.5 (4th Cir. 1984) (noting that different standards should apply based on whether the defendant is a government or private entity). *See also* McCormack, *supra* note 213, at 602 (noting that there is no consensus on the appropriate standard for a government defendant seeking to rebut a plaintiff's prima facie case).

[270] McCormack, *supra* note 213, at 601–02.

[271] *See id.* (analogizing government housing providers to private landlords).

[272] This financial interest is implied by courts' willingness to recognize a "business necessity" defense in Title VII cases against government defendants. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing the business necessity standard); *see also* McCormack, *supra* note 213, at 601–02 & n.273 (recognizing courts' use of the business necessity defense in Title VII cases against public and private defendants and discussing the stronger merits of the defense when used by public entities in Title VII cases than in Title VIII cases).

bear a heavier burden than their private counterparts in proving that a given practice is "necessary" to the achievement of their objectives.[273]

For this reason, most courts addressing Title VIII disparate impact claims have imposed a higher burden on government entities than on private defendants to justify actions that produce a discriminatory effect.[274] This trend and the logic behind it suggest that in Title VIII cases involving government defendants, the Eighth Circuit's heightened "compelling business necessity" may be a more appropriate standard.

While the Third Circuit has rejected the "compelling business necessity" standard as too stringent, even for government defendants,[275] the Supreme Court may not agree. In *Trafficante*,[276] the Court held that administrative interpretations of Title VIII by the Department of Housing and Urban Development (HUD), the administrative agency responsible for implementing and administering Title VIII,[277] are "entitled to great weight."[278] In the administrative proceeding leading up to the Tenth Circuit's decision in *Mountain Side*, the Secretary of HUD interpreted Title VIII as encompassing a "compelling business necessity" standard for defendants seeking to justify their practices.[279] While the Court's holding in *Trafficante* predated this interpretation, *Trafficante* nonetheless suggests that the Supreme Court would give substantial weight to HUD's endorsement of a "compelling business necessity" standard if confronted with the issue.[280]

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[273] McCormack, *supra* note 213, at 602 (citing *Betsey*, 736 F.2d 983; Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)).

[274] McCormack, *supra* note 213, at 602–03 (citing *Betsey*, 736 F.2d 983; *Rizzo*, 564 F.2d 126; *City of Black Jack*, 508 F.2d 1179).

[275] *See Rizzo*, 564 F.2d at 148–49 (noting that because a "compelling interest" is not required under Title VII, such a heavy burden should be reserved only for those defendants seeking to justify *purposeful* discrimination).

[276] 409 U.S. 205 (1972).

[277] *See* 42 U.S.C. § 3608(a) (2006) (granting authority to enforce Title VIII to the Secretary of Housing and Urban Development); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 107 (1979) (describing HUD as "the federal agency primarily assigned to implement and administer Title VIII").

[278] *Trafficante*, 409 U.S. at 210 (citing Udall v. Tallman, 380 U.S. 1, 16 (1965); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).

[279] Mahoney, *supra* note 6, at 443–44.

[280] While several circuit courts have rejected HUD's compelling business necessity standard, those cases involved the standard as applied to *private* defendants. Thus, even if the Supreme Court finds such decisions informative, the possibility remains that HUD's compelling business necessity standard may be appropriate for government defendants. *See* Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996) (applying a "reasonableness" standard); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995) (holding that the Secretary in the administrative proceedings incorrectly

Interestingly, the *City of Black Jack*'s "compelling business necessity" requirement closely parallels the "compelling state interest" standard imposed in cases involving constitutional violations that trigger strict scrutiny review.[281] While strict scrutiny was once thought to be "strict in theory, but fatal in fact,"[282] subsequent jurisprudential developments have disproven this notion,[283] leaving open the possibility that certain government interests may be sufficiently compelling to justify facially neutral practices that produce discriminatory effects.[284] Moreover, as Judge Posner has observed, it may be more constitutionally appropriate to impose a higher burden on government entities than it is to require the same of private parties.[285] This may be attributed in part to the fact that government defendants are more likely than their private counterparts to successfully assert an interest sufficiently "compelling" to justify practices that produce discriminatory effects.[286] As one commentator has suggested, financial objectives in the housing context should give

required the defendant to demonstrate a compelling necessity).

[281] This inference is furthered by the Eighth Circuit's explicit reliance on equal protection jurisprudence in articulating its decision. *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 & n.4 (8th Cir. 1974). Application of this heightened standard would complete the analogy between the statutory business necessity standard and equal protection scrutiny. As discussed *supra*, business necessity for Title VII defendants resembles rational basis review; for Title VIII private defendants, business necessity resembles intermediate scrutiny review. For the reasons discussed in this section, it follows that business necessity for Title VIII government defendants should resemble the highest level of scrutiny.

[282] Stick, *supra* note 64, at 425 n.131 (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

[283] *See supra* Part III.B (discussing *Grutter*). While these developments have taken place in the context of equal protection claims, the notion that certain measures may survive strict scrutiny applies with equal force in the Title VIII context.

[284] While equal protection strict scrutiny applies only to instances of intentional discrimination or disparate treatment, the "compelling business necessity" standard proposed in *Black Jack* applies to facially neutral practices that produce a disparate impact. While the application is different, the level of scrutiny is essentially the same.

[285] *See* Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1533 (7th Cir. 1990) (Posner, J.) ("It is one thing to require a municipal government to consider the impact of its zoning decisions on the racial composition of the municipality, another to require an individual broker to consider and take steps to prevent [disparate impact].").

[286] Despite his protestations against a strict scrutiny standard for business necessity, Stick implicitly recognizes that government defendants may have an easier time justifying discriminatory effects. Although he states that "[e]ven governmental defendants *rarely* have compelling interests at stake," Stick, *supra* note 64, at 426 (emphasis added), this contrasts with Stick's view of private defendants' likelihood of asserting a compelling interest, which appears to be virtually zero. *Id.* at 425–26.

way to more "humane and compassionate mores,"[287] particularly where the defendant is a government entity.[288]

D. "Multiple Actor" Problems and the Need for an "Intervening Cause" Defense

The forgoing analysis may appear to create a significant hurdle for Title VIII defendants—both private and public—particularly in light of the "multiple actor" problem, which is unique to the housing context.[289] The multiple-actor concept recognizes that, in contrast to discriminatory effects in the employment context, discriminatory effects in the housing context are often the result of more than one entity's actions.[290] While a defendant employer's practices are often directly responsible for the discriminatory effects alleged in Title VII cases, Title VIII cases often involve multiple actors that play diverse roles within the housing market. Because of this phenomenon, it is often unclear which actor's practices have produced the disparate effect alleged.[291] The implications may be even more serious when the actor named as a defendant in a disparate impact case is not the source of the problem.

For instance, private developers and sellers of real estate have little control over the practices of other private entities such as mortgage brokers and lending institutions. This means that private sellers who require purchasers to obtain bank financing, for instance, could potentially be held liable under disparate impact theory for the discriminatory actions of a lender who chooses only to grant loans to members of a certain group.[292]

This problem suggests that Title VIII defendants should be able to defend against discriminatory effects for which they are not responsible, or over which they have no control. In addition to promoting general fairness, such a defense may be beneficial to disparate impact doctrine in several ways, particularly if the doctrine is to survive a constitutional challenge. First, recognition of an affirmative defense based on intervening causes or factors may further enable disparate impact doctrine to satisfy the narrow tailoring

[287] United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 119 (5th Cir. 1973).

[288] *See* Mincberg, *supra* note 180, at 179 (applying the "more humane and compassionate mores" argument to cases involving government entities).

[289] *See* Gordon, *supra* note 161, at 451 (discussing the multiple actor dilemma).

[290] *Id.*

[291] *Id.*

[292] *See id.* at 451–52 (discussing the greater ease with which developers and lenders can defend alleged Title VIII violations than can municipal actors).

requirement of strict scrutiny,[293] as it will prevent courts from imposing liability on innocent defendants. Instead, the intervening cause defense may better enable courts to determine the true source of discriminatory effects, and to investigate further if there are indicators of discriminatory intent.

Second, recognition of an affirmative defense based on intervening causes may further reduce the risk that housing providers will "adopt prophylactic measures" in order to avoid disparate impact liability.[294] While defendants pursuing such a defense will run the risk of incurring litigation costs, these costs may be offset by an indemnification claim for litigation costs against the third party.[295] This possibility for indemnification may further assure employers and housing providers that race-conscious measures are unnecessary to avoid disparate impact liability. By ceasing to promote race-conscious conduct in this manner, recognition of an affirmative defense based on intervening causes may further reduce a major source of conflict between disparate impact and equal protection.

CONCLUSION

Disparate impact doctrine under Title VIII is fraught with inconsistencies, particularly with respect to the appropriate test the court should use. While part of the blame lies with the Supreme Court for its dearth of guidance, even a proper ruling or a Congressional amendment[296] would leave open the debate regarding disparate impact's relationship to equal protection. As revealed in *Ricci v. De Stefano*, disparate impact and the pressure it imposes on employers and housing providers to avoid liability may very well conflict with equal protection's ban on racial classifications. Despite this apparent contradiction, the two doctrines may still be reconciled, depending on how future courts read *Ricci* and interpret disparate impact's purpose.

[293] *See supra* Part II.C for further discussion of the narrow tailoring issue.

[294] *See supra* Part II.B.1 (discussing judicial concerns that disparate impact will encourage adoption of prophylactic measures).

[295] For instance, the private developer who requires home buyers to obtain bank financing as a prerequisite to a sale could defend her practice in spite of any discriminatory effects by showing that the bank's practice of granting loans disproportionately to members of a minority group was in fact the underlying cause of any discriminatory effects alleged. While the developer would undoubtedly incur litigation expenses during this process, she could potentially recoup those costs by seeking indemnification against the bank as a third party defendant. *See* FED. R. CIV. P. 14(a)(1) ("A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.").

[296] Congress amended Title VII to explicitly include a disparate impact standard and the burden-shifting framework. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A) (2006)).

As Richard Primus suggests, disparate impact, when viewed as a tool for rooting out discriminatory motives, may in fact serve a compelling government interest in preventing overtly discriminatory acts.[297] If disparate impact doctrine is to survive strict scrutiny, however, it must also be narrowly tailored to achieving that end. This requirement is instructive with respect to the proper test to be applied in Title VIII cases. Because disparate impact is more likely to directly serve the government's interest when framed as a burden-shifting analysis, courts should abandon the *Arlington Heights II* balancing test in favor of the Title VII framework.

While Title VII's standards provide a useful guidepost for courts addressing Title VIII claims, the differences between the housing and employment contexts limit their applicability to Title VIII claims. Because there are likely to be fewer valid justifications for practices that produce discriminatory effects in the housing context,[298] it is only fair to subject Title VIII defendants to a higher standard of proof. This proposition fits nicely with the idea that all racial classifications must be subject to strict scrutiny; because very few (if any) differences among racial groups will justify unequal treatment, a higher standard of review should apply.[299] Moreover, such a standard is undoubtedly important if courts are to achieve a thorough understanding of the defendant's rationale, imposing liability only when a clear indication of discriminatory intent is present. In this respect, application of a higher standard will more directly serve the government's interest in rooting out intentional discrimination, increasing disparate impact's chances of surviving strict scrutiny.

It is important to note, of course, that there may very well be solutions to the constitutional dilemma that do not subject disparate impact to strict scrutiny at all.[300] In that case, the absence of a narrow tailoring requirement would eliminate a major justification for abandoning the balancing test. Moreover, if the Court interprets *Ricci* in a manner that differs from Primus's "general reading" of the case, the conflict between disparate impact and equal protection may be less of a threat than some critics and members of the Court appear to

[297] Primus, *Future*, *supra* note 12, at 1377.

[298] *See* McCormack, *supra* note 213, at 565–66 (discussing the limitations of Title VII justifications as applied to Title VIII defendants).

[299] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (noting that race is "a *group* classification long recognized as . . . irrelevant" and that it "should be subjected to detailed judicial inquiry") (internal quotation marks and citation omitted).

[300] *See* Primus, *Round Three*, *supra* note 15, at 501 ("Traditionally, the most straightforward strategy for protecting disparate impact doctrine from a constitutional challenge would be to avoid heightened scrutiny altogether.").

believe.[301] This is not to say that courts would be entirely justified in continuing to apply the balancing test under Title VIII. As this Note and other critics have observed, the balancing test is arguably flawed in several ways, which may explain why lower courts have chosen to reject it in favor of the Title VII framework.[302] Regardless, the resolution of these questions will depend largely on the facts and circumstances of future disparate impact cases. While one can only speculate as to what the future will bring, any outcome regarding disparate impact doctrine, its constitutionality, and its application in Title VIII will be "highly salient for years to come."[303]

LINDSEY E. SACHER[†]

[301] *Compare* Primus, *Future*, *supra* note 12, at 1382 ("Characterizing Title VII's disparate impact provisions as an evidentiary dragnet could save those provisions from wholesale invalidation in a world where the courts adopted the general reading of *Ricci*."), *with id.* at 1346 ("[D]isparate impact doctrine could survive the institutional reading or the visible-victims reading, or a combination of the two.").

[302] *See* Villas West II of Willowridge Homeowners Ass'n, Inc. v. McGlothin 885 N.E.2d 1274, 1282 (Ind. 2008) (noting that the balancing test "seems doctrinally unsound," especially in light of the language similarities between Title VII and Title VIII).

[303] Primus, *Future*, *supra* note 12, at 1387.

[†] J.D. Candidate, 2011, Case Western Reserve University School of Law.