Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 28

January 1985

Benign Racial Quotas in Public Housing: Burney v. Housing Authority of the County of Beaver {551 F. Supp. 746}

Elizabeth M. Bagdon

BENIGN RACIAL QUOTAS IN PUBLIC HOUSING: *BURNEY v. HOUSING AUTHORITY OF THE COUNTY OF BEAVER*

When Congress passed the Fair Housing Act[1] in 1968, many believed that ending racial discrimination in the sale or rental of housing would help to eliminate segregated communities.[2] Several city officials and public housing authorities believe, however, that nondiscriminatory housing practices may lead to a substantial increase in the percentage of minority group members in an area, stimulating white flight and resulting in a resegregated, all-minority community.[3] In order to maintain integration, planners sometimes use race conscious programs, such as benign steering or racial quotas, in an attempt to limit the proportion of minority group members in the community.[4] In *Burney v. Housing Authority of the County of Beaver*,[5] a federal district court held that by selecting tenants for public housing on the basis of their race, a local housing authority violated the equal protection clause of the fourteenth amendment because these selection procedures intentionally dis-

1. 42 U.S.C. §§ 3601-3631 (1982).

2. *See, e.g.*, 114 CONG. REC. 3422 (1968) (comments by Senator Mondale that "the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns" if housing discrimination becomes illegal).

3. *See, e.g.*, Otero v. New York City Hous. Auth., 484 F.2d 1122, 1124 (2d Cir. 1973) (city claims that adherence to own regulation would create non-white "pocket ghetto"); 114 CONG. REC. 3421 (1968) (statement of Senator Mondale that real estate brokers "fear the loss of listings, of buyers or of tenants if they are known to sell or lease to Negroes . . ."). *See generally* Note, *Benign Steering and Benign Quotas: The Validity of Race-Conscious Government Policies to Promote Residential Integration*, 93 HARV. L. REV. 938 (1980).

4. Park Forest South, Illinois and Shaker Heights, Ohio have benign steering programs that encourage blacks to move into predominantly white areas and vice versa. Note, *supra* note 3, at 945-46. A proposed racial quota plan in Oak Park, Illinois would have prohibited blacks from buying rent property on certain blocks where blacks already owned 30% of the property. The village eventually rejected the proposal. Note, *The Use of Racial Housing Quotas to Achieve Integrated Communities: The Oak Park Approach*, 6 LOY. U. CHI. L.J. 164, 164-65 (1975).

5. 551 F. Supp. 746 (W.D. Pa. 1982), *vacated on other grounds*, 735 F.2d 113 (3d Cir. 1984).

criminated on the basis of race and because the selection plan was not necessary and precisely tailored to achieve the goal of providing integrated public housing.[6] The court also held that the plan violated the Fair Housing Act because of its racially discriminatory impact and because the Housing Authority could have used less discriminatory means to reach its goal.[7]

Under a 1975 consent order with the Pennsylvania Human Rights Commission, the Housing Authority of Beaver County established a goal of thirty-three percent black occupancy in each of its five housing projects to desegregate those projects and to maintain a constant level of integration.[8] When the black occupancy rate was more or less than thirty-three percent, the Housing Authority offered vacancies to members of the underrepresented race. When the black occupancy rate was at thirty-three percent, the Housing Authority offered vacancies to persons of the same race as the departing tenants.[9] The plaintiffs were several black women who were on the Housing Authority waiting list when they filed suit.[10] The district court agreed with their contentions that the racial quota system violated the equal protection clause of the

6. *Id.* at 764.

7. *Id.* at 770.

8. *Id.* at 749, 752. The 33% figure, according to the Pennsylvania Human Rights Commission (PHRC), represented the percentage of black residents in Beaver County's projects. The PHRC claimed that this figure was to change each year, depending on the demand for public housing by each race. The Housing Authority asserted that the 33% figure was to remain constant from year to year. *Id.* at 752. The court found it unnecessary to interpret the consent order because the plan was "constitutionally and statutorily infirm regardless of whether the target racial balance is a fixed or fluctuating percentage." *Id.* at 753.

9. *Id.* at 750-51. The Housing Authority divided Beaver County into five districts, each of which was largely racially homogeneous. Persons applied for public housing in the district where they lived, which led, for example, to a surplus of black applicants in District I. *Id.* at 765. In 1980, only one of the four District I projects that accepted families had fewer than 33% black residents, which made it very difficult for a black family to get public housing in that district. *Id.* at 753.

A person denied housing in one district because of race would have found it difficult to obtain public housing in other districts because the Housing Authority never followed the part of the consent order that required it to look outside of a district for applicants of an underrepresented race if no suitable families of that race had applied within the district. *Id.* at 751.

10. *Id.* at 748. The plaintiffs in this suit were also representatives for "a class defined as all minority low-income individuals who have applied for public housing with Defendants and all minority low-income individuals who will apply for public housing with Defendants." *Id.*

fourteenth amendment[11] and the Fair Housing Act.[12]

Federally subsidized public housing began with the Housing Act of 1937.[13] In practice, federal housing projects were completely segregated[14] until the Supreme Court's 1954 decision in *Brown v. Board of Education*.[15] In 1962, President Kennedy issued an executive order[16] that prohibited discrimination in some public housing units.[17] Congress broadened this prohibition in Title VI of the Civil Rights Act of 1964[18] by forbidding discrimination in all federally funded programs.[19]

---

11. The equal protection clause of the fourteenth amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12. 551 F. Supp. at 764, 770. The Fair Housing Act states, in pertinent part, that "it shall be unlawful . . . [t]o refuse to rent a dwelling to any person because of race [or] [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race. . . ." 42 U.S.C. §§ 3604(a), (b) (1982).

The plaintiffs also claimed that the defendant's actions violated the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1982), the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1982), § 6 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4 (1982), and § 5(h) of the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 951-63 (Purdon 1964 & Supp. 1983). The court chose to consider only the Fair Housing Act and equal protection claims in its opinion. 551 F. Supp. at 751-52, 754.

13. Housing Act of 1937, ch. 896, 50 Stat. 888 (1937), superseded by Pub. L. 93-383, tit. II, 88 Stat. 653 (1974).

14. The 1937 Act became law while the *Plessy v. Ferguson* "separate but equal" doctrine was still in force. 163 U.S. 537 (1896). Local public housing authorities administered the projects, and after World War II, all of the Public Housing Authority's projects were segregated by race. Note, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871, 871-72 (1966). In Chicago, for example, the local housing authority refused to rent apartments in several projects located in white areas of the city to blacks until 1954. Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907, 909 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

15. 347 U.S. 483 (1954).

16. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (1962), *reprinted in* 42 U.S.C. § 1982 (1982).

17. The executive order prohibited discrimination in federally owned housing or in housing procured with federal funding if the government agreed after the date of the executive order to provide those funds. 42 U.S.C. §§ 101(a)(i)-(iv) (1982). The order also directed federal agencies to use their "good offices" and litigation if necessary to end discrimination in existing projects. *Id.* § 102. *See also* Sloane, *One Year's Experience: Current and Potential Impact of the Housing Order*, 32 GEO. WASH. L. REV. 457 (1964) (article written by Housing and Home Finance Agency attorney discussing potential strengths and weaknesses of the executive order); Note, *supra* note 14, at 879.

18. 42 U.S.C. §§ 2000d-2000d-6 (1982). In pertinent part, Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be

Congress passed the Fair Housing Act[20] in 1968, and confirmed this prohibition of racial discrimination in public housing.[21] According to one of its sponsors, one of the Act's goals was to end segregated housing and assure blacks that they would have equal access to affordable housing.[22] Plaintiffs, therefore, have two avenues by which to seek remedies for discriminatory housing practices: the Fair Housing Act and the equal protection clause of the fourteenth amendment.

Although the United States Supreme Court has implied that a plaintiff can establish a violation of the Act without proving intentional discrimination,[23] several federal courts have held that proof of discriminatory intent is unnecessary to establish a Fair Housing Act violation.[24] To illustrate, in *Resident Advisory Board v. Rizzo*,[25] the

---

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

19. Note, *supra* note 14, at 880.

20. 42 U.S.C. §§ 3601-3631 (1982). *See supra* note 12 for the text of §§ 3604(a) & (b).

21. The Act exempts home owners who sell their own homes without using a broker, subject to certain exceptions, and owner-occupied dwellings accommodating no more than four families. 42 U.S.C. §§ 3603(b)(1), (2) (1982).

22. Senator Mondale, one of the sponsors of the Act, made several comments about the value of integration and the groundlessness of white fears about a mass migration of blacks into their neighborhoods. 114 CONG. REC. 3422 (1968) ("the rapid, block-by-block expansion of the ghetto will be replaced by truly integrated and balanced living patterns"); *id.* at 3421 ("[e]xperience under the District of Columbia fair housing ordinance demonstrates that the number of Negroes in previously all white areas of the city is strictly regulated by their ability to pay"); *id.* at 2278 ("there is a substantial market of financially able Negroes prevented from buying housing of their choice because of deeply entrenched patterns of discrimination in the sale of housing in our country").

23. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). In *Arlington Heights*, the Supreme Court ruled that to establish a fourteenth amendment equal protection violation, a plaintiff must show discriminatory intent on the defendant's part. *Id.* at 270-71. The Court then remanded the case to the court of appeals to determine if the defendant had violated the Fair Housing Act. *Id.* at 271. *See infra* notes 44-47 and accompanying text for a discussion of the Court's *Arlington Heights* scrutiny. *See also* Washington v. Davis, 426 U.S. 229 (1976).

24. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (discussed *infra* notes 25-29 and accompanying text); Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

Arlington Heights concerned a village's refusal to rezone an area to allow construction of federally subsidized townhouses for persons of low or moderate income. The village had zoned the area for detached single-family houses for more than a decade. 558 F.2d at 1286. The court of appeals gave four factors to consider when deciding whether a defendant violated the Fair Housing Act: 1) the strength of plaintiff's showing of dis-

Court of Appeals for the Third Circuit held that a plaintiff need only show a discriminatory effect to state a prima facie case.[26] The burden of proof then shifts to the defendant to establish that his actions serve "a legitimate bona fide interest."[27] In addition, the defendant must prove that he was unable to use less discriminatory means to achieve his goals.[28] Once the defendant makes that showing, the plaintiff, to prevail, must demonstrate that the defendant had less discriminatory means at his disposal.[29]

It is more difficult for a plaintiff to gain redress for discriminatory housing practices if the plaintiff bases his or her claim on the equal protection clause. Federal courts closely examine government actions that explicitly classify persons by race, even if the classifications pur-

---

criminatory effect; 2) any evidence of discriminatory intent, even if the evidence is insufficient to prove an equal protection violation under the standard set forth in *Washington v. Davis*; 3) the defendant's interest in taking the action; and 4) whether the plaintiff seeks to have the defendant provide additional housing or merely to have the defendant allow someone else to provide that housing. *Id.* at 1290. The court of appeals remanded the case, directing the district court to rezone the land if Arlington Heights failed to provide another suitable plot of land for subsidized housing. *Id.* at 1295, 1285. Arlington Heights eventually agreed to annex some land for public housing to avoid rezoning the original site. Metropolitan Hous. Dev. Corp. v. Arlington Heights, 616 F.2d 1006 (7th Cir. 1980).

In *City of Black Jack*, a group wished to build low- and moderate-income housing in an unincorporated area that the city zoned for multifamily dwellings. Citizens in the area incorporated the housing site and the surrounding area into the City of Black Jack, and changed the zoning ordinance to prohibit the construction of new multifamily dwellings. 508 F.2d at 1182-83. The city was 99% white, and there was evidence that "many blacks" would live in the project. *Id.* at 1186. The Court of Appeals for the Eighth Circuit held that if the plaintiff could show that the defendant's actions had a discriminatory effect, the defendant must show that his actions were "necessary to promote a compelling governmental interest." *Id.* at 1185. In effect, *City of Black Jack* requires strict scrutiny if a plaintiff establishes a prima facie case of racial discrimination in the housing area. *See id.* at 1185 n.4.

25. 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

26. *Id.* at 146.

27. *Id.* at 149 ("a justification must serve, in theory and in practice, a legitimate, bona fide interest of the Title VIII defendant . . .").

28. *Id.*

29. 564 F.2d at 149 n.37. The court of appeals in *Resident Advisory Board* essentially adopted the test for a Title VII violation in Griggs v. Duke Power Co., 401 U.S. 424 (1971). *Griggs* held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. In addition, *Griggs* stated that Congress intended to place the burden on the defendant to show that the practice is related to job performance. *Id.* at 432. *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 150-85 (1976).

port to treat all races equally.[30] Such actions violate the equal protection clause unless they can survive strict scrutiny[31] or are proper remedies for past discrimination.[32] The precise standard that remedial racial classification must meet is unclear. In *Swann v. Charlotte-Mecklenburg Board of Education*,[33] the Court stated that it would be beyond the power of a court to order racial quotas in school desegregation cases unless the quotas were flexible and a court limited the quotas to eliminating segregation caused by government violations of the fourteenth amendment.[34] The Court also stated, however, that school districts could assign students to schools to make the racial composition of the schools reflect that of the community in order to teach students to live in a pluralistic society.[35]

---

30. *See* Loving v. Virginia, 388 U.S. 1 (1967) (Supreme Court invalidated a statute forbidding interracial marriages); McLaughlin v. Florida, 379 U.S. 184 (1964) (Supreme Court struck down a statute making it a crime for a black person and a white person of the opposite sex to "habitually live in and occupy in the nighttime the same room").

31. *See* Korematsu v. United States, 323 U.S. 214 (1944) (exclusion of persons of Japanese ancestry from certain West Coast areas was held to be constitutional). Because actions almost never survive strict scrutiny, one scholar has described the test as "strict in theory and fatal in fact." Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

32. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (the Court upheld Congress' 10% set aside of a grant for minority contractors); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (the Court upheld classification of children on the basis of race to desegregate schools).

In United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), five Justices appeared to approve the formation of legislative districts based on the percentage of minority voters within them, in an attempt to ensure proportional representation of minorities in the legislature. *Id.* at 165-68 (plurality opinion, joined by White, Stevens, and Rehnquist, JJ.); *id.* at 179-80 (Stewart and Powell, JJ., concurring in judgment). One year later, however, Justice Powell attempted to narrow *United Jewish Organizations* by stating in his *Bakke* opinion that it "properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate. . . ." *Bakke*, 438 U.S. 265, 304-05 (1978).

33. 402 U.S. 1 (1971).

34. *Id.* at 24-25. In a companion case, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), the Court held that a North Carolina law forbidding the assignment of students to schools by race was unconstitutional because it "would deprive school authorities of the one tool absolutely essential to the fulfillment of their constitutional obligation to eliminate existing dual school systems." *Id.* at 46.

35. 402 U.S. at 16. In McDaniel v. Barresi, 402 U.S. 39 (1971), a companion case to *Swann*, the Court held that assigning students to schools by race to integrate schools did not violate the equal protection clause. *Id.* at 41.

In two later cases, *Regents of the University of California v. Bakke*[36] and *Fullilove v. Klutznick*,[37] the Justices were unable to agree upon a single standard for the acceptable use of affirmative action quotas. One approach, advocated only by Justice Powell in both cases, was to require that all racial classifications survive strict scrutiny.[38] A second approach, advocated by four Justices in *Bakke* and three in *Fullilove*,[39] would require that benign quotas "serve important governmental objectives and . . . be substantially related to achievement of those objectives."[40] Under this approach, so-called benign quotas that burden or stigmatize persons on the basis of race would be invalid.[41] *Fullilove* also involved a third approach, in which three Justices held that all racial classifications must "receive a most searching examination."[42] The meaning of this third test is unclear, although the Justices advocating its use stated that the racial classification that the Justices upheld under it in *Fullilove* could have survived either of the tests that the Court announced in *Bakke*.[43]

---

36. 438 U.S. 265 (1978). In *Bakke*, a white male applicant to a state medical school, whom the school rejected, sued to overturn the school's quota for minority applicants. The applicant claimed that the "benign" quota discriminated against him on racial grounds. *Id.* at 276-78.

37. 448 U.S. 448 (1980). In *Fullilove*, the plaintiff challenged a federal statute requiring that all grantees under the Public Works Employment Act of 1977 spend 10% of their grants on minority business enterprises unless they could obtain waivers from the Secretary of Commerce. *Id.* at 453-54.

38. *See Bakke*, 438 U.S. at 290-91; *Fullilove*, 448 U.S. at 496 (Powell, J., concurring). In *Bakke*, Justice Powell stated, "when a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." *Id.* at 305. Moreover, in Justice Powell's judgment, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.* at 299.

39. In *Bakke*, Justices Brennan, White, Marshall, and Blackmun agreed on this second approach to scrutinizing benign racial classifications. 438 U.S. at 324. In *Fullilove*, Justice White abandoned that approach and joined the Chief Justice's plurality opinion advocating a "searching examination" of racial quotas. 448 U.S. at 453.

40. *Bakke*, 438 U.S. at 359 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)); *see Fullilove*, 448 U.S. at 519.

41. 438 U.S. at 361.

42. 448 U.S. at 491.

43. *Id.* at 492. The three Justices who announced this new test in *Fullilove*—Chief Justice Burger, Justice White, and Justice Powell—each had joined a different opinion in *Bakke*. Chief Justice Burger had joined Justice Stevens' opinion that stated that racial quotas in federally funded programs violated Title VI of the Civil Rights Act of 1964. 438 U.S. at 418. Justice White joined Justice Brennan's opinion that advocated a lower level of scrutiny of benign racial classifications. *See supra* notes 38-40 and accom-

The Supreme Court has applied equal protection analysis in the area of housing discrimination. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[44] a suburb enacted a facially neutral zoning ordinance that the plaintiffs claimed violated the equal protection clause because of its discriminatory impact.[45] The Court ruled that the plaintiffs had to prove that the village acted with discriminatory intent before the Court would apply strict scrutiny,[46] and not the rational relation test,[47] to the village's actions. The result of *Arlington Heights* is that it will be more difficult for plaintiffs to prove that governmental housing practices violated the fourteenth amendment equal protection clause.[48]

Several lower federal courts have sanctioned the use of race con-

---

panying text. Justice Powell alone in *Bakke* had stated that all racial classifications required strict scrutiny. 438 U.S. at 290-91.

All opinions comprising the majority in *Fullilove* stressed several of the same factors in upholding the racial quota. These included: 1) Congress' broad remedial powers under the fourteenth amendment, *id.* at 483, 500-01; 2) the small proportion of federal construction expenditures involved, *id.* at 484-85 n.72, 514-15; and 3) the availability of a quota waiver, *id.* at 487-89, 514. While Justice Marshall failed to emphasize explicitly the importance of a waiver, one can infer his concurrence on this point from his statement that only qualified minority firms would be recipients of funds under the quota. *Id.* at 521. Without the possibility of a waiver, firms that failed to find enough qualified minority firms to use would be forced either to use unqualified firms or to lose the grant.

44. 429 U.S. 252 (1977). For a discussion of *Arlington Heights*, see Comment, Arlington Heights: *Planning for a Segregated Community*, 14 URBAN L. ANN. 307 (1977). For a discussion of later developments in *Arlington Heights*, see *supra* note 24.

45. *Id.* at 254.

46. The Supreme Court has used several different formulations of the strict scrutiny test. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.) (the classification must be "precisely tailored to serve a compelling governmental interest"); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (the classification must be "necessary to promote a *compelling* governmental interest") (emphasis in original); Loving v. Virginia, 388 U.S. 1, 11 (1967) (the classification must be "necessary to the accomplishment of some permissible state objective").

47. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961) ("The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective."); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike").

48. *Cf.* 429 U.S. at 265-66 ("[C]ourts refrain from reviewing the merits of [legislators' and administrators'] decisions, absent a showing of arbitrariness or irrationality . . . . Where there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer warranted."); *id.* at 270 ("Respondents simply failed to carry their burden that discriminatory purpose was a motivating factor in the Village's decision.").

scious measures that attempt to desegregate public housing and to prevent "tipping" in housing or schools.[49] Tipping occurs when the percentage of minority group members increases to the point at which whites will leave or avoid an area, resulting in an area's resegregation.[50] In *Parent Association of Andrew Jackson High School v. Ambach*,[51] the Court of Appeals for the Second Circuit, after applying strict scrutiny, ruled that high schools could restrict minority enrollment to avoid tipping the schools, provided that they could show that such restrictions were necessary to achieve their goal.[52]

Otero v. New York City Housing Authority[53] also concerned the use of race conscious measures to avoid tipping. *Otero* involved an attempt by the New York City Housing Authority to disregard its own regulation giving former site residents priority for new public housing that the city was constructing on the site. The New York City Housing Authority claimed that if it obeyed its regulation it would tip the project and the surrounding area because of the high percentage of minority group members who were former residents.[54] While the Court of

49. *See* Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979); Johnson v. Board of Educ. of Chicago, 604 F.2d 504 (7th Cir. 1979), *vacated and remanded*, 449 U.S. 813 (1980), *on remand*, 664 F.2d 1069 (7th Cir. 1981), *vacated*, 457 U.S. 52 (1982) (both *Parent Association* and *Johnson* upheld school districts' use of racial quotas to keep the proportion of minority enrollment in several schools below the tipping point); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (upheld housing authority's refusal to give previous site residents preference for new housing built on that site because the housing authority believed that allowing such a large proportion of minorities into the new project would tip it and the surrounding neighborhood); Schmidt v. Boston Hous. Auth., 505 F. Supp. 988 (D. Mass. 1981) (upheld a plan giving tenants priority for selection if the tenants chose to live in a project in which their race was underrepresented). For a discussion of *Schmidt*, see Comment, Schmidt v. Boston Housing Authority: *Racial Classifications in Public Housing*, 23 URBAN L. ANN. 343 (1982).

50. *See* Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30, 31 (1960) ("There is a theoretical maximum minority-group proportion which whites will tolerate in any area. Once their proportion is exceeded, the whites will flee. The point beyond which one more minority group member will cause mass exodus is the 'tip' or 'tipping' point. . . ."). The author suggests that a housing authority should only use racial housing quotas as a last resort to prevent tipping, after such measures as manipulating the cost of housing, promoting housing to appeal to one racial group more than another, *id.* at 67-68, and locating housing in areas away from high concentrations of minority group members. *Id.* at 38-39.

51. 598 F.2d 705 (2d Cir. 1979).

52. *Id.* at 717-21.

53. 484 F.2d 1122 (2d Cir. 1973).

54. *Id.* at 1124.

Appeals for the Second Circuit failed to apply any formal equal protection analysis in *Otero*, it held that the city would not violate the former tenants' constitutional rights by the proposed action so long as the New York City Housing Authority could prove that by following its regulations it would almost certainly tip the surrounding area.[55]

Burney[56] also concerned a housing authority plan to avoid tipping in public housing projects and their surrounding areas. Unlike the court in *Otero*, however, the district court in *Burney* examined extensively the Beaver County Housing Authority's actions to decide whether they violated the equal protection clause. It found that the Housing Authority's tenant selection plan demonstrated racially discriminatory intent and therefore required strict scrutiny to determine whether it violated the fourteenth amendment.[57] The plan had discriminatory intent, according to the court, because it selected or rejected equally suitable tenants because of their race.[58] The court assumed *arguendo* that the Housing Authority's interest in having integrated projects was a compelling governmental interest,[59] and stated that the plan would be constitutional if the Housing Authority could show that it was both necessary and precisely tailored to integrate the projects.[60] The court ruled that the quotas were unnecessary because the Housing Authority failed to demonstrate convincingly that the population of the surrounding communities would be in any danger of tipping if it stopped using the quotas.[61] The plan also was not tailored precisely to achieve its stated goals because the Housing Authority failed to show that it admitted as many black applicants as it could without tipping the

55. *Id.* at 1136.

56. 551 F. Supp. 746 (W.D. Pa. 1982).

57. *Id.* at 757.

58. *Id.* at 755 ("[I]t is the government's denial of a benefit solely on the basis of race that triggers strict scrutiny analysis.").

59. *Id.* at 756-57, 764. The court was skeptical about whether the Housing Authority had an affirmative duty to integrate its projects under the Fair Housing Act, 42 U.S.C. § 3608(d)(5) (1982). 551 F. Supp. at 769. The court, however, did not elaborate on this skepticism. *Id.*

60. *Id.* at 764.

61. *Id.* at 766. The plan was also unnecessary, according to the court, because the Housing Authority's policies themselves had caused whatever potential tipping problem already existed in the projects. The Housing Authority had divided the county into districts that were each racially homogenous, leading to a surplus of black applicants in districts in which they were in the majority. According to the court, tipping would not have been a problem if the Housing Authority had used a county-wide waiting list. *Id.* at 765.

projects. The court ruled, therefore, that the plan violated the fourteenth amendment.[62]

The district court also set forth a test for determining whether the plan violated the Fair Housing Act. First, the plaintiffs had to show that the plan had a racially discriminatory effect.[63] The burden then shifted to the defendants to show that: 1) The plan served, "both in theory and practice, a legitimate, bona fide [governmental] interest," and 2) "no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[64] The court held that the plan violated the Act because of its racially discriminatory impact—denying applicants the opportunity to rent property because of their race—and because the defendant could have used an alternative plan, such as a county-wide waiting list, to achieve its goals with less discriminatory impact.[65]

The tenant selection plan in *Burney* differs from the remedial measures that the Supreme Court has upheld under the rational relation test.[66] First, those measures were temporary,[67] while the county intended[68] the *Burney* tenant selection plan to be permanent, that is, the Housing Authority continued to use race to select tenants even after a project was integrated.[69] The *Burney* plan is also more burdensome than the approved remedial plans. For example, in the school desegregation cases the burden consisted of school districts assigning students

62. *Id.* at 767.

63. *Id.* at 769-70.

64. *Id.* at 770 (quoting Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977)).

65. 551 F. Supp. at 770.

66. *See supra* note 47.

67. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 484-85 n.72 (1980) (the Court stressed the small proportion of federal construction funding in relation to total U.S. construction expenditures—.25%—that Congress had contemplated for minority business enterprises).

68. *See supra* note 8 and accompanying text.

69. There is, however, dicta in *Swann* indicating that voluntary and permanent racial quotas to maintain a racial balance in the district's schools similar to that in the district as a whole are constitutionally permissible. 402 U.S. at 16. Also, if United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), still sanctions legislative reapportionment to assure proportional racial representation in the legislature even in the absence of a prior equal protection violation, that case would support the use of some permanent and voluntary racial quotas. *But see Bakke*, 438 U.S. 265, 304-05 (1978) (Powell, J.) (contrary interpretation of *United Jewish Orgs.*).

to a different school because of race, while in *Burney* the county denied public housing to persons because of their race.[70] Another major difference between *Burney* and the other remedial cases is that in *Burney* the burden appears to fall primarily on members of racial minorities,[71] while in the other remedial cases the burden appears to fall evenly upon all races, as in the school desegregation cases, or upon whites only, as in the affirmative action case *Fullilove*.[72]

Because the racial classification in *Burney* is insufficiently analogous to those in the cases containing permissible remedial racial classifications, it had to survive a higher level of scrutiny than the rational relation test.[73] Based on its reading of *Bakke*[74] and *Parent Association of Andrew Jackson High School*,[75] the district court subjected the tenant selection plan to strict scrutiny,[76] and concluded that the plan was unconstitutional because it was neither necessary nor precisely tailored to achieve an arguably compelling governmental interest. As the court noted, the number of blacks allowed in a project was unrelated to the project's tipping point if indeed there were any real danger of tipping in the projects or in the surrounding area.[77] The court's application of strict scrutiny is consistent with the use of that test in other judicial decisions.[78]

The *Burney* court also properly applied its circuit's test for Fair

70. Other remedial cases involve less burdensome actions than those in *Burney*. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (nonminority firms were only precluded from competing for a minute proportion of federal construction grants); United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring in the judgment) (legislative reapportionment in the case did not deny persons the right to vote, nor did it deny them county-wide proportional representation by race).

71. The original plaintiffs in *Burney* were both blacks and whites. To "simplify the issues," before trial the plaintiffs changed the class so that it would include only minority group members. 551 F. Supp. at 770 n.8.

72. 448 U.S. 448 (1980).

73. *See supra* note 47 for cases applying the rational relation test.

74. 438 U.S. 265 (1978).

75. 598 F.2d 705 (2d Cir. 1979).

76. 551 F. Supp. at 755.

77. *Id.* at 765-67.

78. The Supreme Court most likely would agree with the *Burney* court's use of strict scrutiny. In *Bakke*, Justice Powell stated that strict scrutiny was appropriate for all racial classifications. 438 U.S. at 290-91. The Justices who supported a lower level of scrutiny for the affirmative action quotas in *Bakke* and *Fullilove* would likely concur with the use of strict scrutiny in *Burney* because those Justices were opposed to benign quotas, such as the one in *Burney*, that burden minority groups. 438 U.S. at 361, 375. In *Bakke*, for example, Justice Brennan stated that "any statute must be stricken that

Housing Act violations, set forth in *Resident Advisory Board v. Rizzo*,[79] when it found that the Housing Authority's quota system violated the Act.[80] The court found that the plan had a racially discriminatory impact because it denied applicants public housing based on their race. It also found that the Housing Authority could have used less discriminatory methods to integrate the projects.[81] One such method that the court did not discuss in *Burney*, however, is that a housing authority can provide alternative housing for those denied public housing for purposes of avoiding the tipping of a project.[82]

The court in *Burney* did not ban absolutely the use of racial quotas in public housing.[83] Rather, the court left open the possibility that a housing authority could use quotas if it were able to prove that tipping almost certainly would occur in the near future, and that quotas alone would prevent it. If other courts share the *Burney* court's skepticism[84] of whether tipping actually occurs, however, it could be difficult for housing authorities ever to justify the use of quotas to avoid it. They will certainly find it more difficult to justify integration maintenance quotas than desegregation quotas because of the Supreme Court's em-

---

stigmatizes any group or that singles out those least represented in the political process to bear the brunt of a benign program." *Id.* at 361.

79. 564 F.2d 126, 146 (3d Cir. 1979). *See supra* notes 25-29 for a more detailed description of *Resident Advisory Bd.* and its Fair Housing Act test.

80. The plan in *Burney* would be invalid as well under the test that the Court of Appeals for the Eighth Circuit used in *City of Black Jack*. *See supra* note 24. That test is essentially the same as strict scrutiny, except that the plaintiff need only show that the defendant's actions had a discriminatory effect rather than having to show that his actions were taken with discriminatory intent. Because the plan in *Burney* had a discriminatory impact and failed to survive strict scrutiny, it would violate the Fair Housing Act under the *City of Black Jack* test.

The plan may also have violated the Fair Housing Act under the test set forth by the Court of Appeals for the Seventh Circuit in *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, *see supra* note 24, provided that the plaintiffs could show that the plan had a sufficiently strong discriminatory effect. *See Arlington Heights*, 558 F.2d at 1290. Because the court designed this test to deal with facially neutral actions, it is questionable whether a court should apply this test to a case in which a defendant uses explicit racial classifications.

81. 551 F. Supp. at 769-70.

82. *See* Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 294 (1974).

83. 551 F. Supp. at 764.

84. For an example of the court's skepticism, see *id.* at 766 ("[w]e recognize that some courts and commentators have come to regard the tipping phenomenon as a proven sociological phenomenon . . .").

phasis on the remedial nature of the quota plans it has sanctioned.[85] The maintenance of quotas that deprive one race access to desegregated public housing could be unconstitutional under the above standard.

Burney can have far-reaching impact upon the public housing field. It breaks new ground in explicitly disapproving a desegregation plan for public housing that involves racial quotas. The decision places housing authorities on notice that they should carefully design any racial classifications they use to ensure that the classifications are actually necessary to promote desegregation.

Elizabeth M. Bagdon

85. *See Fullilove*, 448 U.S. at 487 (Burger, J.); *id.* at 510, 513 (Powell, J., concurring); *id.* at 519 (Marshall, J., concurring in judgment); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971). The Court in *Swann* emphasized that racial imbalance itself is not unconstitutional, stating, "[i]f we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24.