RESURRECTING *MOUNT LAUREL*: USING TITLE VIII LITIGATION TO ACHIEVE THE ULTIMATE *MOUNT LAUREL* GOAL OF INTEGRATION

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This paper will present an as applied challenge to the New Jersey Fair Housing Act (NJFHA). Specifically, Regional Contribution Agreements (RCAs) will be attacked by use of a disparate impact theory under the federal Fair Housing Act (Title VIII, also known as the FHA). This law prohibits discrimination in housing based on race and national origin. Part I of this paper discusses the findings of the statistical data of Seton Hall University's Center for Public Service Study, which reveals a disproportionate impact based on race and national origin on persons of low to moderate income in *Mount Laurel* housing. Part II includes a history of the pertinent *Mount Laurel* decisions and the NJFHA. Part III contains an analysis of Title VIII and related federal case law. Part IV discusses remedies including litigation and changes to the NJFHA.

Recently reported data from a study conducted by the Center for Public Service at Seton Hall University revealed what many housing advocates intuitively knew existed with respect to *Mount Laurel* housing: suburban *Mount Laurel* housing is overwhelming occupied by Whites, while urban housing is occupied by Blacks and Latinos.[1] The Study is of major importance because for the first time, data was collected and analyzed to determine whether *Mount Laurel* has been successful in providing economically and racially integrated housing.

This Study provides housing advocates with a vehicle to once again challenge both judicial and, more importantly, legislative initiatives that have failed to accomplish the goals that Justice Hall enunciated in *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel* over twenty years ago. The Study provides statistical proof that New Jersey still consists of segregated communities where Whites enjoy the good life

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[1] *See generally* NAOMI BAILIN WISH, PH.D. & STEPHEN EISDORFER, ESQ. THE IMPACT OF *MOUNT LAUREL* INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS (1996) [hereinafter The Study].

of suburbia and minorities languish in urban centers where crime is high, education poor, and the job market lacking. Why is this happening? And what can be done?

INTRODUCTION

In 1975, the New Jersey Supreme Court embarked upon a journey that would forever change land use planning in New Jersey.[2] In *Mount Laurel I*, the state's highest court struck down the exclusionary zoning ordinance of a small but developing community.[3] In so doing, it held " . . . that every municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing."[4]

Eight years later, in *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel* (*Mount Laurel II*), the court, frustrated by municipalities' non-compliance[5], issued an opinion that would "put some steel" into *Mount Laurel I*."[6] While the decision threw the court into further controversy, it nevertheless forced the Legislature to act.[7]

The vehement urging of the court and panic of municipalities and public officials[8] compelled the New Jersey State Legislature to enact the Fair Housing Act (NJFHA) in 1985.[9] This Act was upheld and praised

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[2] *See* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [hereinafter *Mount Laurel I*].

[3] The Court concluded that Mt. Laurel's zoning ordinance was contrary to the general public welfare clause of the New Jersey State Constitution and outside the municipality's zoning power. *See id.* at 185, 336 A.2d at 730.

[4] *See id.* at 174, 336 A.2d at 724.

[5] "Mt. Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case." Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 199, 456 A.2d 390, 410 (1983) [hereinafter *Mount Laurel II*].

[6] "To the best of our ability, we shall not allow it [non-compliance] to continue . . . . The [constitutional] obligation is to provide a realistic opportunity for housing, not litigation." *See id.*

[7] *See* Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 31 n.6 (1987) (citing Harold A. McDougall, *From Litigation to Legislation to Exclusionary Zoning Law*, 22 HARV.C.R.-C.L. L. REV. 623, 625) (1987).

[8] *See* Justin M. Monaghan & William Penkethman, Jr., Comment, *The Fair Housing Act: Meeting the* Mount Laurel *Obligation with a Statewide Plan*, 9 SETON HALL LEG. J. 585, 592 (1986) ("The Act directs that the preferred means of addressing the fair share controversies is not through the courts, but via the mediation and review process set forth in the Act. Further, the Act expresses the Legislature's contempt for the Court invented builder's remedy.").

[9] N.J. STAT. ANN. § 52:27D-301-334 (West 1996).

by the New Jersey Supreme Court in *Hills Development Co. v. Township of Bernards (Mount Laurel III)*.[10]

After twenty years of litigation and legislation, New Jersey still has not reached the implicit and ultimate goal of *Mount Laurel*, namely, the integration of its communities.[11] There still exists in New Jersey communities where the words "Mount Laurel" mean a place on the map rather than a "realistic opportunity" for an affordable, decent home in a safe neighborhood where a job and quality education are commonplace.

This paper will discuss using both the federal Fair Housing Act,[12] (Title VIII) and the federal courts to resurrect the *Mount Laurel* doctrine so that "the realistic opportunity" for an affordable home is just that—realistic.

This paper will also provide a preliminary review of *Mount Laurel* cases and NJFHA. While NJFHA has accomplished some good, it has failed to integrate neighborhoods and, indeed, has perpetuated segregation. This failure creates a Title VIII cause of action against state actors.

Title VIII prohibits discrimination in housing.[13] A major policy objective of Title VIII is racial integration.[14] Nonetheless, sections of NJFHA, instead of implementing the *Mount Laurel* doctrine, actually perpetuate segregation in violation of Title VIII. Particularly egregious is NJFHA's allowance of Regional Contribution Agreements (RCAs), permitting a community to sell up to 50% of their fair share to another community in the region.[15] This creates a disparate impact based on race and national origin in violation of Title VIII.

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[10] 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*].

[11] In his concurrence in *Mount Laurel I*, Justice Pashman wrote, "[w]ith this decision, the Court begins to cope with the dark side of municipal land use regulation—the use of the zoning power to advance the parochial interests of the municipality at the expense of the surrounding region and to establish and perpetuate social and economic segregation." 67 N.J. at 193, 336 A.2d at 735. "The purpose of land use regulation is to create pleasant, well-balanced communities, not to recreate slums in new locations." *See id.* at 212, 336 A.2d at 745.

[12] 42 U.S.C. § 3601-3618 (1994 & Supp. 1997).

[13] *See id.*

[14] "The reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting Senator Mondale, 114 CONG. REC. 3422 (1968)).

[15] *See* N.J. STAT. ANN. § 52:27D-312 (West 1996). Housing region is defined as "a geographic area of not less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities . . . . " N.J. STAT. ANN. § 52:27D-304(b) (West 1986 & Supp. 1997). Additionally, the Council on Affordable Housing (COAH) adopted a plan that broke the state up into six regions. Monaghan & Penkethman, Jr., *supra* note 8, at 594 n.63. Region 1 is Bergen, Passaic, and Hudson counties; Region 2: Essex, Morris, Sussex, and Union; Region 3: Middlesex, Somerset, and Warren; Region 4: Monmouth and Ocean; Region 5: Burlington, Camden,

The concept of disparate impact is quite simple. While a legislative or administrative action appears neutral on its face, it nevertheless creates a clear, disproportionate pattern that cannot be explained on any other ground but race.[16] With the use of the recently gathered statistical data, this paper will show that New Jersey neighborhoods remain segregated even though it is true that *Mount Laurel* housing has been built. The data shows that suburban *Mount Laurel* housing is substantially occupied by Whites. By contrast, urban housing is substantially occupied by minorities. The data plainly shows these disproportionate effects as they concern minority groups in New Jersey.

The United States Supreme Court has affirmed the use of statistical data in proving disparate impact claims.[17] Similarly, circuit courts[18] have held defendants liable for Title VIII violations by the showing of a disparate impact on a particular racial group, without the need to prove intent.[19]

While other, less litigious remedies may help solve New Jersey's integration problem, it is comforting to know that the New Jersey judiciary (as well as the federal judiciary) will act if necessary. As former Chief Justice Wilentz wrote in *Mount Laurel II*, "[w]e may not build houses, but we do enforce the Constitution."[20]

I. THE STUDY

The Study was done to determine the impact and effect of the *Mount Laurel* decisions. This Study collected data that was analyzed to ascertain the characteristics of those persons occupying *Mount Laurel* housing.[21]

The Study was done to determine whether the anti-exclusionary zoning initiatives set forth in *Mount Laurel I* and its progeny have suc-

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Gloucester, and Mercer; and Region 6: Atlantic, Cape May, Cumberland, and Salem counties. *See id.*

[16] *See* Resident Advisory Board v. Rizzo, 564 F.2d 126, 141 (3d Cir. 1977) (citations omitted) [hereinafter *Rizzo*].

[17] "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08, (1977) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977)).

[18] *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987); Rizzo, 564 F.2d at 150; Hanson v. Veterans Administration, 800 F.2d 1281 (5th Cir. 1986); United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

[19] *See id.*

[20] *Mount Laurel II*, 92 N.J. at 213, 456 A.2d at 417.

[21] *See* WISH & EISDORFER, *supra* note 1, at 19.

ceeded in providing housing for low to moderate income people in suburban communities that have excluded certain groups of people through their zoning practices.[22] The Study focused on who presently occupies *Mount Laurel* housing and whether people of color have had the opportunity to move into suburban *Mount Laurel* housing.[23]

The Study used data collected and maintained by the Affordable Housing Management Service (AHMS).[24] This database included approximately 36,000 applicants for low and moderate income housing and approximately 7500 additional occupants of such housing during 1988 to 1996.[25] The Study's results were not surprising.

First, only a very small number of those occupying *Mount Laurel* housing actually moved from an urban area to a suburban area.[26] Second, the study found that Black and Latino applicants are less likely to obtain housing managed by the AHMS than their White counterparts.[27] Third, Blacks and Latinos overwhelmingly occupy urban units and Whites overwhelmingly occupy suburban units.[28]

Of those housing units that are administered by the AHMS, 81% of suburban units are occupied by Whites and 85% of urban units are occupied by Blacks or Latinos.[29] Additionally, of all the households in the database for past and previous residence based on race and ethnicity, only 15% of previous urban dwellers have moved to the suburbs.[30]

The Study also provides more glaring statistics. For example, 86% of Whites who applied for housing previously lived in the suburbs, unlike 86% of Blacks and 80% of Latinos who applied, who lived in urban areas.[31] Additionally, 65% of White occupants who previously lived in urban areas moved to the suburbs whereas only 5% of Blacks and only 2% of Latinos moved to the suburbs.[32] Of those Black occupants that lived in

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[22] *See id.* at 1.

[23] *See id.* at 7. (The Study also focused on age, sex, size of household, and disability. For purposes of this paper, only race and ethnicity will be discussed.)

[24] *See id.* at 1. The AHMS is a state agency created by NJFHA established to aid municipalities and developers in achieving their Mount Laurel obligation. Specifically, the AHMS sets eligibility requirements and pricing controls for Mount Laurel housing. *See id.* at 2.

[25] *See id.* at 1.

[26] *See* WISH & EISDORFER, *supra* note 1, at 1.

[27] *See id.*

[28] *See id.* at 2.

[29] *See id.* at 53.

[30] *See id.* at 69.

[31] *See* WISH & EISDORFER, *supra* note 1, at 70.

[32] *See id.*

the suburbs, 21% went back to the cities.[33] Of those Latinos who moved to the suburbs, almost all remained there.[34]

Interestingly, although Whites make up almost 70% of income-eligible households, they only represent approximately 33% of applicants.[35] In contrast, Blacks make up 21% of income-eligible households and represent 45% of applicants.[36] Latinos represent 4% of income-eligible households and represent 12% of applicants.[37]

The Study does not address "the why" of these results although it does state that various reasons are possible.[38] For the purposes of this paper, however, the striking statistics offer proof of a prima facie case of a violation of Title VIII.[39]

II. THE MOUNT LAUREL CASES

In October 1970, Ethel Lawrence,[40] a resident of Mt. Laurel, heard the mayor of her town state, "'If you people'—you poor and black people, that is—'can't afford to live in our town, then you'll just have to leave.'"[41] These words marked the beginning of what would become the nation's most innovative and controversial case in land use planning and affordable housing.[42]

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[33] *See id.*

[34] *See id.*

[35] *See id.* at 37.

[36] *See* WISH & EISDORFER, *supra* note 1, at 38.

[37] *See id.* at 38-39.

[38] *See id.* at 71. ("This study does not enable us to distinguish among possible causes for this phenomenon. It could be individual or group preferences . . . . Many want to remain in the municipality in which they currently live . . . . On the other hand, subtle discrimination by builders, mortgage lenders, or others could lead to these results.").

[39] Racial segregation not only exists in New Jersey but throughout the country. "Eighty-six percent of suburban Whites live in communities that are less than 1% Black. Seventy-five present of White Americans live in suburban or rural areas, while more than 50% of Black and Hispanic Americans live in urban areas." James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 103 (1993).

[40] DAVID L. KIRP ET AL., OUR TOWN, RACE, HOUSING AND THE SOUL OF SUBURBIA 3-4 (Rutgers Univ. Press 1995). Mrs. Lawrence was a "devoted mother and good neighbor" who put aside her life, subjected herself to hostility and threats of violence. Like Rosa Parks who refused to give up her seat on a bus in Montgomery, Alabama, Ethel Lawrence did what she believed was the right thing to do. This, of course, changed history. *See id.*

[41] KIRP ET AL., *supra* note 40, at 2.

[42] *See id.* at 3. ("Their impact reached far beyond New Jersey, affecting policies from Massachusetts to California, as Mount Laurel became the *Roe v. Wade* of fair housing, the *Brown v. Board of Education* of exclusionary zoning." *See id.*).

What made *Mount Laurel I* so controversial is that the New Jersey Supreme Court placed an affirmative duty[43] on municipalities to provide an opportunity for the building of low-income housing "at least to the extent of the municipality's fair share of the present or prospective regional need therefor."[44] The court imposed this duty because it concluded that exclusionary zoning practices designed to keep "undesirables" out were violative of the general welfare clause of state's constitution.[45]

Justice Hall, writing for the majority, held:

> [w]e conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[46]

In reaching this conclusion, the court recognized New Jersey's need for affordable, decent housing.[47] The court discussed how the state had changed, "shedding" its rural nature and undergoing large population increases.[48] It addressed the problems of cities, where the erosion of the tax base had led to the cities' inability to provide essential services, to offer a decent life for its residents, and had led employers to move to the suburbs for safer and cheaper working environments.[49]

Viewing all of these changes in their entirety, the court maintained that the police power of the state was to be used in a way to promote the general welfare.[50] Furthermore, the majority decided the need for housing was so acute[51] that municipalities' parochial interests[52] did not outweigh the wrongful exclusion of certain classes of citizenry.[53] Justice Hall

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[43] *See* Frederic S. Schwartz, *The Fair Housing Act and Discriminatory Effect: A New Perspective*, 11 NOVA L. REV. 71, 95 (1986).

[44] *See id.* (quoting *Mount Laurel I*, 67 N.J. at 174, 336 A.2d at 724).

[45] *See Mount Laurel I*, 67 N.J. at 175, 336 A.2d at 725.

[46] *Id.* at 174, 336 A.2d at 724.

[47] *See id.* at 158, 336 A.2d at 716.

[48] *See id.* at 160, 336 A.2d at 717.

[49] *See id.* at 173, 336 A.2d at 724.

[50] *See Mount Laurel I*, 67 N.J. at 174-75, 336 A.2d at 725.

[51] *See id.* at 203, 336 A.2d at 740. The Department of Community Affairs estimated the need for 400,000 units in New Jersey.

[52] *See id.* at 185, 336 A.2d at 730-31. In *Mount Laurel I*, the township asserted that its zoning ordinance was designed to maintain the tax base and prevent the incurring of additional costs such as increased municipal services and school funding.

[53] *See id.* at 186, 336 A.2d at 731.

submitted that zoning regulations designed to exclude persons based on income did not comport with the general welfare and were invalid.[54]

Notably, the court's opinion was detailed in its assessment of New Jersey's housing problems and Mt. Laurel's exclusionary zoning practices.[55] But the court's remedy covered less than two pages.[56] Instead, the court mistakenly relied on the good faith of the municipalities to amend their exclusionary zoning ordinances and provide their regional fair share.[57]

Justice Pashman's concurrence in *Mount Laurel I* would herald the inception of remedial measures that the *Mount Laurel II* Court would later adopt and expand.

This time when Ethel Lawrence's case came before the state's highest court, the court issued a 212-page decision that included remedies seemingly amounting to legislation. Indeed, this time Ethel Lawrence was not alone. New Jersey's Public Advocate[58] brought suit against twenty-seven other municipalities for failing to comply with *Mt. Laurel I*.[59] All of these suits were stayed while the supreme court decided the consolidated cases in *Mount Laurel II*.[60]

Writing for an unanimous court, Chief Justice Wilentz drafted a forceful opinion that would reiterate the goals of *Mount Laurel I* and set out remedies in light of legislative inaction.[61] The court, frustrated by

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[54] *See id.* at 175, 336 A.2d at 725.

[55] *See Mount Laurel I*, 67 N.J. at 191-93, 336 A.2d at 734-35. Justice Pashman's concurrence added that Mount Laurel's exclusionary zoning ordinances included: minimum requirements for square footage of housing; minimum lot size and front acreage requirements; prohibition of multi-dwellings; bedroom restrictions; and overzoning for non-residential uses. *See id.*

[56] *See id.* But see Justice Pashman's concurrence regarding judicial enforcement. The concurrence set forth the factors that trial courts should utilize when creating relief. Those factors included: "(1) identifying the relevant region; (2) determining the present and future housing needs of the region; (3) allocating these needs among the various municipalities in the region; and (4) shaping a suitable remedial order." *See id.* at 215-16, 336 A.2d at 747.

[57] *See id.* at 192, 336 A.2d at 734.

[58] On July 1, 1994, the Whitman Administration abolished the Public Advocate's Office (the Office). Prior to its abolition, supporters of the Public Advocate lobbied Governor Christine Todd Whitman to keep the Office opened to "protect the little guy." Opponents of the Public Advocate viewed the Office as an "unbridled, dictatorial watchdog that pursued a leftist agenda." The Governor's comment was that the office "had outlived its usefulness." *See* Donna Leusner, *Stroke of the Pen Dismantles Public Advocate*, STAR LEDGER, June 30, 1994, at 26.

[59] Stanley C. Van Ness, *On the Public Advocate's Involvement in* Mount Laurel, 14 SETON HALL L. REV. 832, 836 (1984).

[60] *See id.*

[61] *See generally* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

non-compliance, sought to compel the enforcement of the constitutional mandate enunciated in *Mount Laurel I*.[62]

In doing so, the court recognized the gaps in *Mount Laurel I* that had left many questions[63] unresolved. In *Mount Laurel II*, the court developed definitions[64] and remedies[65], while at the same time encouraging the Legislature to act and to assist in enforcing the Court's constitutional fiat.[66]

Once again, the Court struck down numerous zoning ordinances and reemphasized its power to do so.[67] "The basis for the constitutional obligation is simple," wrote the Chief Justice:

> [t]he State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos[68] for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the state may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality . . . [69]

Not only did the Court clearly set forth its mandate and the municipalities' obligation, it explicitly stated that towns must take affirmative steps to meet the mandate.[70] These included affirmative steps such as density bonuses to developers and mandatory set-asides of new low to

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[62] *See id.* at 204-05, 456 A.2d at 413 (citing *Mount Laurel I*, 67 N.J. at 174, 336 A.2d at 713).

[63] For example, "[w]as it a developing municipality? What was the region and how was the region to be determined? How was the fair share to be calculated within that region? Precisely what must that municipality do to affirmatively afford an opportunity for the construction of lower income housing?" *See id.* at 205, 456 A.2d at 413.

[64] *See generally* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[65] *See generally id.*

[66] *See id.* at 352, 456 A.2d at 490.

[67] *See id.* at 208, 456 A.2d at 415.

[68] The court expressed much concern over the isolation of low-income groups in certain areas. Those areas affect all citizens of New Jersey. The court addressed issues such as urban blight, decay, violent crime, drug use, and jobs leaving New Jersey. The Chief Justice submitted that these issues do not remain within the city, but spread to the suburbs and are infectious to those living there. "In sum," the justice wrote, "the decline of our cities and the increasing economic segregation of our population are not just isolated problems for those left behind in the cities, but a disease threatening us all. Zoning ordinances that either encourage this process or ratify its results are not promoting our general welfare, they are destroying it." *See id.* at 211, 456 A.2d at 416 n.5.

[69] *See Mt. Laurel II*, 92 N.J. at 209, 456 A.2d at 415.

[70] *See* Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1200 (1989).

moderate income units.[71] In addition, the Court also encouraged litigation by builders to enforce the Mt. Laurel obligation.[72] This remedy, known as the "builder's remedy,"[73] was extremely controversial.[74]

The court stated that a municipality's fair share obligation must be quantified[75] as to the number of units. The court suggested the use of the State Development Growth Plan (SDGP) as a means to control where development should and would occur.[76] It instituted a six year period of repose from litigation for those municipalities that adopted housing plans and zoning ordinances acceptable to the Council on Affordable Housing (COAH).[77] Finally, in dealing with enforcement, the court set up a "separate" judiciary to deal with *Mount Laurel* litigation.[78]

The *Mount Laurel II* court recognized the doctrine was right but its administration wrong.[79] The court reinforced the *Mount Laurel* doctrine, expressed its displeasure over past non-compliance, mandated affirmative future steps and reemphasized the need for housing, not litigation.[80] The court reiterated the need for legislative involvement and issued a challenge to the other branches of government:

> [W]hile we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the Mount Laurel

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[71] *See id.*

[72] *See id.* at 1201.

[73] *Id.* at 307, 456 A.2d at 467.

[74] This remedy was not new but the Court reinforced its use to achieve *Mount Laurel* objectives. The builder's remedy allowed a court to issue a permit to a developer if the proposed development met three factors: (1) "[i]t provided lower-income housing; (2) it was consistent with sound planning criteria; and (3) the municipality had failed to meet its Mount Laurel obligations." Lamar et al., *supra* note 70, at 1201 (citing *Mt. Laurel II*, 92 N.J. at 279-80, 456 A.2d at 452).

[75] *See id.*

[76] *See Mount Laurel II*, 92 N.J. at 214, 456 A.2d at 418. The Court was concerned that Mount Laurel not be used to develop land carte-blanche. Instead the Court envisioned development through sound planning in growth areas. The Court also noted that a municipality's fair share could be affected by practical realities such as land availability, environmental concerns, and transportation problems for potential residents.

[77] *See* Lamar et al., *supra* note 70, at 1201 (citing *Mt. Laurel II*, 92 N.J. at 291-92, 456 A.2d at 458-59.)

[78] This separate judiciary consisted of three judges who, with time, would become well acquainted with the issues and render consistent opinions. In so doing, the Court expressed the need for efficiency—the need for housing, not litigation. These judges had the power to appoint special masters to help municipalities make necessary changes. *See Mount Laurel II*, 92 N.J. at 281-84, 456 A.2d at 453-54.

[79] *See id.* at 351-52, 456 A.2d at 490.

[80] *See id.* at 352, 456 A.2d at 490.

> doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.[81]

The Legislature accepted this challenge and NJFHA was passed in 1985. The enactment was a result of heated debates by the sponsors of NJFHA and the Governor's office.[82] Under threat of veto by Governor Kean, the Legislature amended the NJFHA bill to: (1) increase permissible Regional Contribution Agreements (RCAs) from 30% to 50%; (2) place a moratorium on the builder's remedy; (3) change the definitions of "fair share"[83] and "prospective need";[84] and (4) impose a six-year statute of repose for those municipalities who reach settlement with the state agency, known as COAH.[85]

Interestingly enough, one of the primary objectives of NJFHA was to eliminate the judiciary from land use planning.[86] During the legislative debate, Governor Kean stated that he would support a constitutional amendment that would ban the judiciary from land use matters.[87] Finally, when NJFHA was passed, the *Mount Laurel* doctrine was placed into the hands of COAH.[88]

Several important provisions of NJFHA include the creation of COAH[89] to calculate housing needs for municipalities; substantive certification;[90] a housing element;[91] mediation and review process;[92] a phase-in

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[81] *Id.*

[82] Wynona M. Lipman, *The "Fair" Housing Act?*, 9 SETON HALL L.J. 569, 570 (1986). Senator Lipman was an original sponsor of NJFHA. By the time the bill went to a full vote, the Senator could no longer support the bill. *See id.*

[83] When adopting a "fair share" number, the Council should take into consideration (1) the environment and historical sites; (2) drastic alterations; (3) adequate use of land for recreational, conservation, and farming needs; (4) adequacy of open space; and (5) development contrary to the SDGP. *See* Jerome G. Rose, *New Jersey Enacts a Fair Housing Law*, 14 REAL EST. L.J. 195, 203 (1986).

[84] *See id.* (noting that the amendment would change the calculation of prospective need, basing it on actual development and growth rather than on statistics.).

[85] *See id.* at 204.

[86] *See id.* at 211 ("The formulation of housing and land use policy by the judiciary, no matter how commendable and meritorious that policy is, constitutes a usurpation by the judiciary of the powers of the legislature.").

[87] *See* Rose, *supra* note 83, at 212.

[88] *See* N.J. STAT. ANN. §§ 52:270-305 (West 1996).

[89] *See id.* The agency also has the "authority to determine whether a municipality's fair share plan truly provides realistic opportunity for affordable housing." Alexander's Dept. Store of New Jersey, Inc. v. Borough of Paramus, 125 N.J. 100, 112, 592 A.2d 1168, 1174 (1991). The scope of COAH's power is broad. *See* Franzese, *supra* note 7, at 36. COAH has the authority to promulgate "whatever rules and regulations may be necessary to achieve its statutory task." *Mount Laurel III*, 103 N.J. at 1, 510 A.2d at 621.

[90] Procedures were put in place whereby a municipality would submit a plan to COAH. *See* N.J. STAT. ANN. § 52:27D-309(a) (West 1996). In turn COAH would issue

period for municipalities in developing and implementing their fair share; financial assistance to the municipalities; a two-year moratorium on the builder's remedy; and the creation of RCAs.[93]

RCAs enable a municipality to "transfer up to 50% of its fair share to another municipality within its region by means of a contractual agreement into which two municipalities voluntarily enter."[94] While much commentary and scholarly work has been written about *Mount Laurel*, little has been written about RCAs and their effects and RCAs have not been litigated to any great degree.[95]

RCAs have been called "compensation for exclusionary zoning" because urban areas are literally compensated for costs they bear as a result of exclusionary zoning by suburbs.[96] While some scholars theorize that RCAs are an efficient use for development of land, others question the ability of the receiving municipality (usually urban) (1) to voluntarily enter into such agreements and (2) to afford such agreements.[97]

Indeed, RCAs may cause an increase in the number of poor who seek new housing.[98] A city's acceptance of such persons only increases its overall costs because the needs of such indigents are often met by municipal funds.[99] Alternatively, indigents may be displaced by RCAs.[100]

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a certification if such plan conformed to *Mount Laurel* requirements. *See* N.J. STAT. ANN. § 52:27D-314 (West 1996).

[91] *See* N.J. STAT. ANN. § 52:27D-309(a) (West 1996): "[T]he municipality shall prepare and file with the council a housing element, based on the council's criteria and guidelines . . . .").

[92] This provision removes objections to substantive certification from the courts to an administrative review process. If material objections still exist after a determination by COAH, an appeal to the New Jersey Superior Court, Appellate Division could be taken by the party opposing the granting of certification. *See* N.J. STAT. ANN. § 52:27D-315(a) (West 1996). This procedure creates a burden on the opposing party because the determination by COAH is considered presumptively valid. *See* N.J. STAT. ANN. § 52:27D-317 (West 1996).

[93] *See* Rose, *supra* note 83, at 196.

[94] N.J. STAT. ANN. § 52:27D-312(a) (West 1996).

[95] *But see* Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986); *In re* Warren, 132 N.J. 1, 622 A.2d 1257 (1993).

[96] *See* Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 666 (1987). As Justice Pashman recognized [in *Mount Laurel I*], "municipalities were using their zoning power to take advantage of regional development without having to bear the burdens of such development." *Id.* (citing *Mount Laurel I*, 67 N.J. at 195, 336 A.2d at 736 (Pashman, J., concurring)).

[97] *See id.* at 682. "The receiving municipalities are burdened by an overabundance of poor residents, a rapidly shrinking tax base, and the disappearance of federal subsidies and its bargaining power is thus limited . . . . They [the cities] will enter into the RCA because they face the stark reality of fiscal crisis and will regard RCA funds as a new revenue source with which to service the populations they already house." *Id.*

[98] *See id.* at 683-84.

[99] *See id.* at 684.

Urban renewal programs have tended to displace the poor.[101] Urban areas are rebuilt for educational, business, and cultural institutions.[102] These institutions tend to displace the poor because many patrons do not wish to come in contact with certain types of people.[103]

Startling but true, urban renewal pushes poor, most often minority, dwellers into other slum areas.[104] The lack of urban revitalization sends jobs elsewhere and rehabilitating housing becomes a waste of assets.[105] Concentrated pockets of poor, minority areas increase costs overall.[106] The vicious cycle continues.

Such truisms have forced housing advocates to critically examine RCAs, as they conflict with the letter and spirit of *Mount Laurel*. RCAs merit close examination concerning the fairness of the allocation between the city and suburb;[107] the bargaining power of each party;[108] the extent that RCAs give suburbs "a free ride";[109] and the disparate impact based

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[100] *See id.* A sending municipality, with the approval of COAH, will send/contribute money to the receiving municipality. This agreement usually occurs between a suburb and city (e.g., In Region 2, Roseland to Newark). The contribution is to be used for housing. *See* N.J. STAT. ANN. § 52:27D-312(c) (West 1996). Cities, such as Newark, through these types of funds and the like are attempting to rebuild their communities. "In theory, urban renewal was a program intended to revitalize the city for both blacks and whites." Reggie Oh, Comment, *Apartheid in America: Residential Segregation and the Colorline in the Twenty-First Century*, 15 B.C. THIRD WORLD L.J. 385, 395 (1995) (citing HILLEL LEVINE & LAWRENCE HARMON, THE DEATH OF AN AMERICAN JEWISH COMMUNITY: A TRAGEDY OF GOOD INTENTIONS (1992)). "In reality, urban renewal became known as "Negro removal," because the programs only intensified the segregation and isolation of inner-city blacks." *See id.* (citing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 9, 56 (1983)).

[101] *See* Oh, *supra* note 100, at 395.

[102] *See id.* at 394 (citing MASSEY & DENTON, *supra* note 100, at 55).

[103] *See id.*

[104] *See id.* at 395. (MASSEY & DENTON maintain that urban renewal programs worsen segregation because they "frequently only shifted the problems of blight, crime and instability from areas adjacent to elite white neighborhoods to locations deeper inside the black ghetto.") (citations omitted).

[105] *See* Anthony M. Vaida, *Affordable Housing in New Jersey—The Still-Unrealized Dream*, 20 REAL EST. L.J. 85, 89-90 (1991).

[106] *See* Hartnett, *supra* note 39, at 107-08. An increased need for police, prisons and social services becomes necessary; insurance rates increase; and jobs are lost. When this type of life emerges, frustration grows and the Los Angeles Riots are inevitable.

[107] *See* McDougall, *supra* note 96, at 684.

[108] *See id.* Suburban bargaining power is enhanced by the NJFHA and its provisions. RCAs allow suburbs to avoid their responsibilities for developing low to moderate income housing under the *Mount Laurel* doctrine. *See id.* at 688.

[109] *See* McDougall, *supra* note 96, at 684.

> The cities are forced by exclusionary zoning to absorb poor and underemployed people who are drawn to the area by its economic development but who cannot earn wages sufficient to afford decent housing. People in these circumstances burden the public facilities of the city without appreciably

on race whereby minorities live in overcrowded, poorly-funded cities and Whites live in suburbs that provide opportunities of many types.[110]

After NJFHA was passed, many praised the legislation as revolutionary and unique.[111] Finally, the state legislature had enacted a statute to implement the goals of *Mount Laurel*, thus taking a stronger role and limiting the judiciary.[112] What seemingly began as a creative answer to the highest court's request for help in enforcement of *Mount Laurel* slowly became an obstruction to its true intent and purpose. It has been 22 years since *Mount Laurel I* and 12 years since NJFHA, and still New Jersey communities are segregated.

The Study clearly shows that NJFHA, COAH,[113] and its regulations have not resulted in integration of New Jersey communities. RCAs, a mechanism created within NJFHA and enforced by COAH thwart integration by allowing white suburban communities to sell their fair share to urban communities so their neighborhoods stay relatively the same while urban cities are forced to keep the poor.

NJFHA and RCAs[114] have not gone unchallenged by housing advocates. In 1986, one year after its enactment, NJFHA was upheld by the New Jersey Supreme Court in *Mount Laurel III*.[115] The constitutional challenge to NJFHA was primarily based on the ability of NJFHA to implement the *Mount Laurel* obligation.[116] Issues in the *Mount Laurel III* case did not include a Title VIII challenge.

Chief Justice Wilentz, in affirming NJFHA, applauded the legislative effort and recalled that the court had urged the Legislature to act in *Mount Laurel II*.[117] The Chief Justice wrote that the legislative response

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> adding to the municipal tax base. On the other hand, suburbs use exclusionary zoning to free themselves of responsibility for such people, instead homogenizing their population to include only persons who impose less on public facilities and add more to the tax base.

See id. at 691-92 (citations omitted).

[110] *See* WISH & EISDORFER, *supra* note 1, at 20. "Because poor people . . . are disproportionately Black or Latino, exclusionary zoning has the foreseeable effect of restricting Blacks and Latinos to the cities, fostering and perpetuating racial segregation . . . ." *Id.*

[111] *See* Monaghan, *supra* note 8, at 585.

[112] *See* Franzese, *supra* note 7, at 33, 35.

[113] *See* Vaida, *supra* note 105, at 86 (COAH is "one of the state's most ineffective bureaucracies.").

[114] *See In re* Warren, 247 N.J. Super. 146, 588 A.2d 1227 (1991).

[115] *See Mount Laurel III*, 103 N.J. at 1, 510 A.2d at 621.

[116] *Mount Laurel III*, 103 N.J. at 40, 510 A.2d at 642. The Act was also challenged on the basis that it interfered with judicial power. *See id.*

[117] *See id.* at 24, 510 A.2d at 634. "They [the legislature] has responded. It appears to be a significant response." *See id.*

has "trigger[ed] our readiness to defer. We hold that the Act [NJFHA] is constitutional . . . "[118]

The court, in one paragraph, addressed RCAs and the rationale for these agreements.[119] The Court stipulated, however, that the agreements should be in keeping with "convenient access to employment opportunities and conform to sound comprehensive regional planning."[120]

Mount Laurel III marked the court's readiness to withdraw from the field.[121] But the court left open its ability to re-enter the fray when and if NJFHA did not fulfill the constitutional mandate of *Mount Laurel*.[122] In closing, the court's opinion stated:

> No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens. The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed; our determination to perform that duty has not changed.[123]

Five years later, in 1991, NJFHA and COAH's regulatory powers were challenged in New Jersey's appellate court.[124] Included in this suit brought by the Public Advocate, was the claim that RCAs and priority preference regulations were invalid.[125] The Public Advocate brought suit after COAH granted substantive certification of several municipalities' fair share plans.[126] The Public Advocate asserted that RCAs and priority preferences violated equal protection, the New Jersey Law Against Discrimination (LAD)[127] and Title VIII.[128]

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[118] *See id.*

[119] *See id.* at 38, 510 A.2d at 641. Such rationale included eliminating the financial burden of fair share from municipalities and rehabilitating housing in urban areas where most lower income people live. *See id.*

[120] *Mount Laurel III*, 103 N.J. at 38, 510 A.2d at 641.

[121] *See id.* at 64, 510 A.2d at 655.

[122] *See id.* at 23, 510 A.2d at 633. "If, however, as predicted by its opponents, the Act [NJFHA], despite the intention behind it, achieves nothing but delay, the judiciary will be forced to resume its appropriate role." *See id.*

[123] *See id.* at 66, 510 A.2d at 655.

[124] *See In re* Warren, 247 N.J. Super. 146, 588 A.2d 1227 (1991).

[125] *See id.* at 157, 588 A.2d at 1233. Occupancy preferences were created by COAH through an administrative regulation. *See* N.J. ADMIN. CODE tit. 5, § 92-15.1 (West 1996). Such regulation provides: "[f]or all low and moderate income housing units provided in inclusionary developments, municipalities shall establish occupancy such that initially, no more that 50% of the units are available to income eligible households that reside in the municipality or work in the municipality and reside elsewhere." *See id.*

[126] *In re* Warren, 246 N.J. Super. at 146, 588 A.2d at 1227. NJFHA allows for challenges to the grant of substantive certification. After a final agency determination, such objections may be appealed to the appellate division.

[127] N.J. STAT. ANN. § 10:5-1 *et seq.* (West 1996).

[128] *See In re* Warren, 246 N.J. Super. at 146, 588 A.2d at 1227.

The Public Advocate contested RCAs on two grounds.[129] First, that RCAs violate the spirit of *Mount Laurel* because the agreements shift proposed suburban housing to municipalities that were already overwhelmed with their share of regional low-income households.[130] Second, that RCAs violate constitutional and statutory bans against racial discrimination[131] because such agreements construct housing in areas where a disproportionately large number of minorities reside as opposed to constructing housing where little or no minorities reside.[132]

The appellate division held that RCAs did not violate Title VIII because the Public Advocate had failed to establish a prima facie case.[133] The court concluded that the Public Advocate's reliance on 42 U.S.C.A. § 3604(a)[134] (Title VIII) was misplaced and inapplicable to RCAs.[135] The Court stated that even if a prima facie case was proven, a compelling justification for RCAs is the urban revitalization realized and this justification further negated a possible Title VIII violation.[136]

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[129] *See id.* at 162, 588 A.2d at 1235.

[130] *See id.*

[131] Fair Housing Act, 42 U.S.C. § 3601 *et seq.*; New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 *et seq.* (West 1996).

[132] *See In re* Warren, 247 N.J. Super. 146, 162, 588 A.2d 1227, 1235 (1991).

[133] *See id.* There are several tests to establish a prima facie case of disparate impact of racial discrimination regarding Title VIII. These tests have been set forth by the circuits and will be discussed in depth in Part III of this paper. *See* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 588 F.2d. 1283, 1290 (7th Cir. 1977); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977); Huntington Branch N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 938-40 (2d Cir. 1988).

[134] Section 3604(a) of Title 42 of the U.S. Code makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

[135] *In re* Warren, 247 N.J. Super. at 168-69, 588 A.2d at 1239. "This prohibition against discrimination in the sale or rental of real property has no applicability to a decision by a suburban municipality to fund the construction or rehabilitation of housing in an urban municipality rather than to rezone for multifamily housing within its own boundaries." But cf. Metropolitan Hous. Dev. Corp., 588 F.2d at 1283, holding that under some circumstances, a violation of § 3604(a) can be proven by showing discriminatory effect without showing intent. There are two types of effects. The second, "is the effect which the decision has on the community; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act . . . " *See id.* at 1289-90.

[136] *In re* Warren, 247 N.J. Super. at 169, 588 A.2d at 1239. In some circuits, under a racial disparate impact claim, the plaintiff must prove a prima facie case. Once established, the defendant may offer "a legitimate, bona-fide governmental interest" that could not be served by less discriminatory means. *See Huntington Branch N.A.A.C.P.*, 844 F.2d at 936. But see *Huntington Branch N.A.A.C.P.* where the Second Circuit held that there are less intrusive means of accomplishing urban renewal than allowing zoning which perpetuates segregation. *See* 844 F.2d at 939.

As to the occupancy preference, a divided Court upheld the regulation's constitutionality.[137] Judge Shebell, however, dissenting in part, submitted that "local preferences detract from the *Mount Laurel* objective" by not providing housing to lower income persons who reside within a particular region, but not in a particular municipality.[138] It was on this issue that the New Jersey Supreme Court granted certification.

In 1993, the New Jersey Supreme Court invalidated COAH's local preference regulation.[139] The court denied the petition for certification on the RCA issue.[140] In striking down the local preference regulation, the court concluded that this regulation was inconsistent with calculating a region's fair share and thus not a "valid exercise of agency rulemaking."[141]

Notably, as to the Title VIII violation, the Supreme Court stated:

> [O]ur disposition of these appeals will focus essentially on the grounds implicating the State's affordable-housing policy and will not rest primarily on the alleged violation of Title VIII. Further, the ultimate resolution of federal and state discrimination issues requires, in our view, a broader and more detailed record than that before the Court.[142]

The court then summarized the "prevailing principles" of Title VIII and LAD violations but declined to "resolve or address those issues."[143] The Court maintained, however, that precedent strongly suggested that proof of discriminatory impact alone is enough to establish a discrimination claim.[144]

This precedent, coupled with the statistical data set forth herein, provides a viable challenge in the federal courts that NJFHA provisions, namely RCAs, as applied, create a disparate impact based on race and national origin. Such impact is a violation of Title VIII. The Court should prohibit RCAs because, as applied, they perpetuate racial segregation.

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[137] As to the Title VIII violation, the appellate division stated, "unless an occupancy preference for government sponsored housing is adopted as a subterfuge for discrimination on the basis of race . . . it does not violate the federal Fair Housing Act." *See In re* Warren, 247 N.J. Super. at 176, 588 A.2d at 1242-43.

[138] *See id.* at 183, 588 A.2d at 1246.

[139] *See In re* Township of Warren, 132 N.J. 1, 622 A.2d 1257 (1993) [hereinafter *In re Warren II*].

[140] *See id.* at 8, 622 A.2d at 1261.

[141] *See id.* at 31, 622 A.2d at 1272.

[142] *Id.* at 21, 588 A.2d at 1267.

[143] *See id.* at 22-26, 622 A.2d at 1267-69.

[144] *See* In re *Warren II* 132 N.J. at 25, 622 A.2d at 1269.

III. TITLE VIII

Title VIII was first introduced into Congress by Senator Walter Mondale and the chances for its passing through the House were very slim.[145] During the summer of 1968, however, Dr. Martin Luther King, Jr. was assassinated and urban riots were commonplace.[146] It was those events that prompted Congress to pass the Fair Housing Act.[147]

The broad sweep of Title VIII sought to remedy segregation of America's neighborhoods[148] by replacing ghettos with "truly integrated and balanced living patterns."[149] Indeed, in *Gladstone Realtors v. Village of Bellwood*, the United States Supreme Court remarked on the importance of integration[150] and addressed the adverse consequences of segregation.[151] By providing a private cause of action under Title VIII, Congress attempted to ameliorate the two societies in America - one white - one black.[152]

In establishing a violation of Title VIII courts generally look for discriminatory intent or motive.[153] Courts, however, have held that Title VIII does not require intent or motive[154] to be shown by a plaintiff, but only that the defendant's action had a discriminatory effect.[155] Effect, courts have held, is the "touchstone" of discriminatory practices because:

> clever men may easily conceal their motivations, but more importantly, because . . . whatever our law was once . . . it now firmly

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[145] Hartnett, *supra* note 39, at 93.

[146] *See id.*

[147] *See id.*

[148] Huntington Branch N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 927 (2d Cir. 1988).

[149] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (citing 114 CONG. REC. 2706).

[150] 441 U.S. 91, 111 (1979). "As we have said before, '[t]here can be no question about the importance to a community of promoting stable, racially integrated housing." *See id.* (quoting Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977)).

[151] *See id.* at 110-11. The Court noted the diminution of the tax base and school segregation.

[152] *See* Hartnett, *supra* note 39, at 90.

[153] *See* Schwartz, *supra* note 43, at 72.

[154] *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.") (footnote omitted).

[155] *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977) ("We conclude that, in Title VIII cases . . . unrebutted proof of discriminatory effect alone may justify a federal equitable response."); City of Black Jack, 508 F.2d at 1184 ("To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect.").

> recognizes that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[156]

Discriminatory effect is often found through the use of statistical data.[157] The circuits, however, differ as to whether a prima facie case is established by statistical data alone.[158]

Courts have recognized two types of discriminatory effects[159] that a facially neutral housing policy could have on race.[160] The first is when a policy has "a greater adverse impact on one racial group than on another."[161] The second is when the policy "perpetuates segregation and thereby prevents interracial association" even though the policy does not have a disparate impact on a particular race.[162] But while courts have recognized a discriminatory effect test, the circuits differ as to the "exact role played by discriminatory effect."[163]

In *Metropolitan Housing Development Corp.*, the Seventh Circuit concluded that in some cases, discriminatory effect is enough to show a violation of Title VIII.[164] The court refused to conclude, however, "that every action which produces a discriminatory effect is illegal."[165] Seemingly, for the Seventh Circuit, statistical data is not enough to establish a prima facie case.[166]

To determine whether the discriminatory effect is sufficient to establish a prima facie case, the Seventh Circuit developed a four-prong test:

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[156] *City of Black Jack*, 508 F.2d at 1185 (citations omitted).

[157] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977).

[158] *See id.* at 307. The United States Supreme Court concluded, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* Although *Hazelwood* is a Title VII case, lower courts have applied a similar rationale to Title VIII cases. The Supreme Court, however, has yet to address this issue in a Title VIII context, and thus the circuits differ as to whether statistical data alone establishes a prima facie case of racial discrimination under Title VIII. Notably, the Supreme Court passed on addressing this issue in *Town of Huntington v. Huntington Branch N.A.A.C.P.*, 488 U.S. 15, 18 (1988).

[159] *See* Schwartz, *supra* note 43, at 72.

[160] *See* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 588 F.2d. 1283, 1290 (7th Cir. 1977).

[161] *See id.* (This test was originally developed in a Title VII case where the U.S. Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[162] *Metropolitan Housing Dev. Corp.*, 588 F.2d at 1290.

[163] *See* Schwartz, *supra* note 43, at 74.

[164] *See Metropolitan Housing Dev. Corp.*, 588 F.2d at 1290.

[165] *Id.*

[166] *See* Schwartz, *supra* note 43, at 74 n.18.

> (1) how strong is plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*;[167] (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain defendant from interfering with individual property owners who wish to provide such housing.[168]

Few circuits, however, have adopted this test.[169] In *Arlington Heights*, the circuit court remanded the case to the district court with a procedure for the lower court to follow.[170]

Other circuits have held that a showing of discriminatory effect is enough to establish a prima facie case.[171] But the discriminatory effect may be rebutted by the defendant if the defendant can show a "compelling governmental interest"[172] or "a legitimate, bona fide interest" that cannot be achieved through an "alternative course of action" with a less discriminatory effect.[173]

In *City of Black Jack*, the Eighth Circuit concluded that a prima facie case of racial discrimination can be shown by proof of a racially discriminatory effect.[174] Once the plaintiff has established this, the burden is

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[167] *Washington v. Davis* is an Equal Protection case where the U.S. Supreme Court held that motive and/or intent is required to establish a violation. *See* 426 U.S. 229 (1976).

[168] *Metropolitan Housing Dev. Corp.*, 558 F.2d at 1290.

[169] *See* Schwartz, *supra* note 43, at 75.

[170] *See Metropolitan Housing Dev. Corp.*, 558 F.2d at 1294. The court noted, however, that the case was a close call. "The Village is acting pursuant to a legitimate grant of authority and there is no evidence that its refusal to rezone was the result of intentional discrimination. On the other hand, plaintiffs are seeking to effectuate the national goal of integrated housing within Arlington Heights and are asking nothing more of the Village than that they be allowed to pursue that objective. Whether the Village's refusal to rezone has a discriminatory impact because it effectively assures that Arlington Heights will remain a segregated community is unclear from the record." *Id.*

[171] *See* Schwartz, *supra* note 43, at 75.

[172] United States v. City of Blackjack, 508 F.2d 1179, 1185 (8th Cir. 1974).

[173] Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977). But see where the court indicated that the *Metropolitan Housing Development Corp.*, factors could be considered to determine the merits of a Title VIII case. *See id.* at 148 n.32.

[174] *See City of Black Jack*, 508 F.2d at 1184. In this case the City of Black Jack's county zoning board adopted a plan for the county's 1700 acres. By 1970, the city's housing consisted of 483 acres of single family homes and 15 acres of multi-dwelling homes. During this time, an organization sought to build additional multi-dwelling units for persons of low to moderate income housing. Once the plan became public, opposition was fierce. In response, the city's government passed a zoning ordinance that prohibited multi-family housing. Statistical data revealed that the City's population was 98%-99% White and 1%-2% Black. Black Jack's virtually all White population was strikingly dissimilar to the racial composition of the surrounding areas. While the percentage of

shifted to the defendant to show that its conduct furthered a compelling governmental interest.[175] While the lower court concluded that the ordinance had "no measurably greater effect on blacks that on whites," the Eighth Circuit reversed.[176]

The court of appeals maintained that the lower court erred in failing to consider the "ultimate effect" or "historical context" of the ordinance.[177] The ultimate effect of the city's actions foreclosed new housing to 85% of Blacks in the area, of which 40% were living in substandard housing.[178]

In determining whether the city's justifications[179] rose to the level of "compelling governmental interest," the court examined (1) whether the ordinance actually furthered the city's interests; (2) whether those interests were constitutionally permissible and compelling enough to outweigh the harm; and (3) whether there were less intrusive means to attain those interests. In addressing the city's justifications, the court found no factual basis for any of the city's reasons and thus struck down the ordinance on Title VIII grounds.[180] Apparently the court struck down the ordinance based on both intent and segregative effect.[181]

The Third Circuit in *Resident Advisory Board v. Rizzo* found a violation of Title VIII.[182] In *Rizzo*, the dispute centered around a piece of vacant land proposed for low-income housing in 1959.[183]

Over the years the area in dispute had become a predominantly white area as a result of urban renewal.[184] The urban renewal program

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Blacks increased only slightly in the entire county, the percentage of Blacks in the urban areas of the county more than doubled. Additionally, urban Blacks were disproportionately found in overcrowded and substandard housing.

[175] *See id.* at 1185.

[176] *See id.* at 1186.

[177] *See id.*

[178] *See id.* ("Black Jack's action is but one more factor confining blacks to low-income housing in the center city confirming the inexorable process whereby the St. Louis metropolitan area becomes one that 'has the racial shape of the donut, with the Negroes in the hole and with mostly Whites occupying the ring.'"). *See id.* (citations omitted).

[179] The city primarily relied on three justifications: control of roads and traffic, prevention of overcrowding of schools; and property values. *See* City of Black Jack, 508 F.2d at 1186. There was also some evidence in the record below that there was no need for multi-dwelling units. *See id.*

[180] *See id.* at 1186-87.

[181] *See* Schwartz, *supra* note 43, at 79.

[182] *See Rizzo*, 564 F.2d at 126.

[183] *See id.* at 131.

[184] *See id.* at 130. In the 1950s, Blacks lived in a five-block area and constituted 46% of the population. After the urban renewal program, only four black families lived within the five blocks. By 1970, not one Black family lived in the Southeast corner of Whitman. The 1970 census revealed that only 100 Blacks remained in the urban renewal area, down from the 400 who lived there in 1960. *See id.* at 131-32.

essentially created a concentration of minority sections in one part of the city while, at the same time, reducing the number of Blacks residing in the disputed part.[185]

The public opposition to the construction of low-income housing was fierce.[186] In 1971, a newly elected mayor, Frank Rizzo, publicly opposed the project and instructed his administration to investigate the possibility of canceling the development.[187] After a 57-day trial, the district court judge issued an order for construction of low-income housing.[188]

At the outset, the Third Circuit stated that the "district court correctly reached the merits of the dispute"[189] and affirmed the district court in all but one part of its order.[190]

The Third Circuit noted that the proposed housing project had a "racially disproportionate effect, adverse to Blacks and other minorities in Philadelphia."[191] The project's purpose, however, the court submitted, was to give Blacks and other minorities the opportunity to live in "integrated, non-racially impacted neighborhoods," in keeping with the policy of Title VIII.[192]

The importance of *Rizzo* with regard to Title VIII, *Mount Laurel*, and RCAs is five-fold. First, Title VIII prevents state action that does not comport with Title VIII's policy of the opportunity to live in "integrated, non-racially impacted neighborhoods."[193] Second, Title VIII will be enforced without a showing of intent.[194] Third, a Title VIII vio-

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[185] *See id.* at 130-31. "The net result has been, in the words of the district court, that 'the City of Philadelphia is today a racially segregated city.'" *See id.* (citing Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1006 (E.D.Pa. 1976)).

[186] *See id.* at 134. Residents of the area formed an association, conducting demonstrations and blocking construction efforts for the project. *See id.*

[187] *See Rizzo*, 564 F.2d at 136 n.14. Testimony before the trial court revealed that Mayor Rizzo "felt that there should not be any public housing placed in White neighborhoods because people in White neighborhoods did not want Black people moving with them. Furthermore, Mayor Rizzo stated that he did not intend to allow the PHA to ruin nice neighborhoods." *See id.* (citations omitted).

[188] *See id.* at 138.

[189] *See id.* at 139.

[190] *See id.* at 53.

[191] *See id.* at 141. The waiting list for low-income housing in the city was 95% minority of which 85% were Black. The evidence showed that Blacks were concentrated in the three poorest areas of Philadelphia.

[192] *See Rizzo*, 564 F.2d at 142. "Public housing offers the only opportunity for these people, the lowest income Black households, to live outside of Black residential areas of Philadelphia. Cancellation of the project erased that opportunity and contributed to the maintenance of segregated housing in Philadelphia." *Id.*

[193] *See id.*

[194] *See id.* at 146.

lation occurs where a plaintiff shows discriminatory effect[195] and the governmental entity fails to provide a justification for such effect.[196] Fourth, the justification must serve a legitimate bona fide interest that could not be accomplished with another course of action that had a less discriminatory effect.[197] Finally, the court stated that the level of judicial review must be probing, with less deference to "the seemingly reasonable acts" of government officials.[198]

Another telling case of "seemingly reasonable acts" of governmental officials and discriminatory effect is *Huntington Branch, N.A.A.C.P. v. Town of Huntington*.[199] In this case, the Second Circuit was asked to determine whether the town's ordinance that restricted the development of multi-family housing to a minority urban renewal area violated Title VIII because the town refused to rezone and outright rejected the proposed site for new housing.[200]

Because this was a case of first impression for the district court, the trial judge applied the *Metropolitan Housing Dev. Corp.* test[201]. On appeal, the Second Circuit, after an extensive discussion of the history and purpose of Title VIII, opted for the Third Circuit's test developed in *Rizzo*.[202] After establishing the correct test, the court looked at statistical data[203] and the disparity that existed and concluded that the plaintiffs es-

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[195] Plaintiffs' evidence showed that the urban renewal activities effectively resulted in the removal of all Black families from the area. This, the court concluded, "was sufficient to establish a prima facie case of discriminatory effect." *Id.* at 149.

[196] *See id.* at 146. The government's justification was the fear of violence that may have ensued had the project been built. The court concluded, "the threat of violence cannot justify a deprivation of civil rights." *See id.* at 149.

[197] *See Rizzo*, 564 F.2d at 149. Given the lack of justification, the court did not assess the legitimacy of the government's interest. *See id.* at 150.

[198] *See id.* at 148.

[199] *See* Huntington Branch N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988).

[200] *Huntington Branch N.A.A.C.P.*, 844 F.2d at 928. Plaintiffs sought to construct multi-family, subsidized housing in a predominantly white neighborhood. *See id.*

[201] *See id.* at 933.

[202] *See id.* at 935-36. The court in reversing the use of *Metropolitan Housing Dev. Corp*, submitted that the four-factor test was "too onerous a burden on appellants." The court also concluded that the legislative history of Title VIII "argues persuasively against so daunting a prima facie standard." *See id.* at 936.

[203] In 1980, Huntington's population was approximately 200,000 people. *See id.* at 929. Of that number, 95% of its residents were White, 3.4% were Black. *See id.* Of the 3.4%, 70% of Blacks lived in two areas of Huntington. *See id.* Of the 48 zoned residential areas in Huntington, 30 contained "Black populations of less than 1%" *See id.* The district court found that housing was in short supply in Huntington and Blacks were three times greater in need of housing than Whites. *See id.* Minorities far outnumbered Whites in occupying subsidized rental housing. *See id.* at 938. Similarly, a disproportionate number of minorities were on the waiting list for low income housing. *See id.*

tablished their prima facie case both because of the "harm to Blacks and the segregative impact on the entire community."[204]

Because the plaintiffs established their case, the court went on to review the town's justifications.[205] In refusing to rezone the site, Huntington asserted that the town had a significant interest in urban renewal and rezoning would encourage developers to restore dilapidated neighborhoods.[206]

In rejecting the proposed site for new housing, Huntington claimed that the project was in violation of its Housing and Urban Development (HUD) program calling for no new construction; the development could not be built within the single family zoning area; the area was too heavily trafficked; the parking area was poor as were fire access areas; areas for recreation and play were inadequate; and living space in the individual units was too unrealistic.[207]

In applying the *Rizzo* approach, the Second Circuit started with the second part of the town's justification, i.e. whether another course of action that had a less discriminatory effect was available.[208] The court dismissed the town's justification of urban renewal, which encourages developers to build in a particular area.[209] Rather, the court commented, developers do not build according to politics but base their decision on much more complex criteria.[210] Thus the court stated: "[i]f the Town wishes to encourage growth in the urban renewal areas, it should do so directly through incentives which would have a less discriminatory impact on the Town."[211]

Notably, the Second Circuit refuted the "urban renewal" justification because there are other less discriminatory means of accomplishing its goal. As to the town's other justifications in rejecting the site, the court found its reasoning "entirely insubstantial."[212]

Additionally, in its historical review of Huntington's housing practices, the court noted that Huntington had failed to demonstrate good

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[204] *Huntington Branch N.A.A.C.P.*, 844 F.2d at 938.

[205] *See id.* at 939.

[206] *See id.*

[207] *See id.* at 931-32.

[208] *See id.* at 939.

[209] *See Huntington Branch N.A.A.C.P.*, 844 F.2d at 939.

[210] *See id.* The court concluded that if Huntington wanted urban renewal, it should provide tax incentives, that have a less discriminatory effect than its present zoning policies. *See id.*

[211] *Id.* at 939.

[212] *See id.* at 940. "Post hoc rationalizations by administrative agencies should be afforded 'little deference' by the courts." *Id.* (citations omitted).

faith in building low-income housing.[213] Because of this and the protracted length of the litigation, the court ordered Huntington to rezone.[214]

In summary, in the Third Circuit, Title VIII is violated if a state action does not comport with Title VIII's national policy of integration and nondiscrimination.[215] A Title VIII plaintiff need not prove intent. Instead, to establish a prima facie case, a plaintiff need only show discriminatory effect. After such a showing, the burden shifts to the government to provide a justification for such effect. This justification must serve a legitimate bona fide interest that could not be accomplished with another course of action that had a less discriminatory effect. It is with these factors in mind that Part IV of this analysis sets forth a prima facie case showing that NJFHA through its RCA provisions violates Title VIII.

IV. REMEDIES

It is time to take a more aggressive approach to combating the failures of the *Mount Laurel* decisions and their laudable but yet unachieved goals. Remedies include litigation, changes in the NJFHA, and in the COAH regulations. The *Mount Laurel* mandate is by no means an easy task to accomplish. At what point in time, however, do legislators and judges recognize that integrated and affordable housing in New Jersey is still a dream and not a reality. Twenty-two years have passed; it is now time to act.

The purpose of this paper is to show that RCAs violate Title VIII because, as applied, they perpetuate segregation. The Study shows that Whites live in suburban *Mount Laurel* housing and Blacks and Latinos live in urban *Mount Laurel* housing. Additionally, if one were to look at a wealthy suburb that is relatively close to a major city, the tale would be more telling, as the following illustration shows.

Plaintiff, Laurel Mount is Black and lives in Newark. Monday through Friday, she gets into her car and drives West on Route 280 for approximately 15 minutes and enters the Borough of Roseland. In Roseland, she is employed as a clerk/typist and earns $26,000 per year. Laurel Mount does not want to live in Newark. She wants access to good

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[213] *See id.* at 942. "The history . . . clearly demonstrates a pattern of stalling efforts to build low income housing." *Id.*

[214] *See Huntington Branch N.A.A.C.P.*, 844 F.2d at 942.

[215] A complaint alleging such violation would rely on 42 U.S.C.§ 3604(a); Title 42, Section 3615 of the U.S. Code, states in part, "any law of the state, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." *Id.* In addition, 42 U.S.C. § 3617 states in part, "[i]t shall be unlawful . . . to interfere with any person in the exercise or enjoyment of . . . any right granted or protected by § 3604.".

supermarkets and banking. She wants to go outside at night and not be afraid. She wants good schools for the children she will have one day. She thinks about how nice Roseland is and what a good community it would be to live in.

Roseland, once a small, rural community is now home to a Prudential Insurance Company facility, Automatic Data Processing (ADP) and many New Jersey law and accounting firms. Certainly, Roseland "shed" its rural characteristics and became a developing community.

Not surprising, Roseland and Newark[216] have very little in common. The 1990 U.S. Census[217] offers the following:

	NEWARK	ROSELAND
Per Capita Income ($)	9,424	26,764
White Population (%)	38.4	95.8
Black Population (%)	60.0	.5
Hispanic Population (%)	26.1	1.3
Income Over $50,000 (%)	15.6	62.1
Median Home Value ($)	110,000	242,600
50+ Units (In Structure)	17,875	0

These numbers offer a picture of two communities within 15 miles of each other physically but thousands of miles apart economically and racially. This picture is typical in New Jersey where the state's major urban cities are surrounded by wealthy white suburbs. While Newark and Roseland are in the same region for COAH certification and are close in proximity, Roseland's Black and Hispanic population is less than two percent.

The Public Advocate challenged COAH's grant of substantive certification to Roseland in *In re Warren*.[218] COAH determined that Roseland's regional obligation was 257 units.[219] That number was reduced to 96 because of lack of developable land.[220] Of the 96 units, Roseland, through use of a RCA, gave Newark 66 units, leaving 30 units for Roseland.[221] In addition, COAH assigned 48 units for preference occu-

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[216] Newark and Roseland are in Essex County, COAH's Region 2.

[217] *See generally* U.S. BUREAU OF THE CENSUS, POPULATION DEMOGRAPHIC REPORT: MIDDLE ATLANTIC CENSUS DIVISION (1995).

[218] *See In re* Warren, 247 N.J. Super. 146, 168, 588 A.2d 1227, 1238 (1991).

[219] *See In re* Warren II, 132 N.J. 1, 42, 622 A.2d 1257, 1278 (1993).

[220] *See id.* Ironically, Roseland's lack of developable land is a result of exclusionary zoning.

[221] *See id.*

pancy.[222] The New Jersey Appellate Division upheld RCAs and concluded that they did not violate Title VIII.[223]

The New Jersey Superior Court, Appellate Division, however, erred when the court confused a prima facie case and compelling government justifications.[224] The Public Advocate in *In re Warren* established a prima facie case. Laurel Mount can establish a prima facie case by showing that Roseland's RCA with Newark has a discriminatory effect. Laurel Mount can provide statistics that shows that RCAs have a disproportionate effect on a particular minority group and perpetuate segregation.

Roseland's compliance with the spirit and letter of *Mount Laurel* was diluted with COAH and NJFHA's assistance. COAH's certification effectively excluded many units that would have been available. These units were not built because of the RCA.

In applying the Third Circuit test to establish a Title VIII violation, Laurel Mount will argue that Roseland's RCA with Newark perpetuates segregation because the RCA fails to make housing available in Roseland.[225] Second, she will need only show discriminatory effect—that is—the RCA had a discriminatory effect based on race. Third, after such a showing, the burden shifts to Roseland to provide a justification for such effect. Lastly, Roseland's justification must serve a legitimate bona fide interest that could not be accomplished through another course of action that had a less discriminatory effect.

It is not unrealistic to assume that because of the population characteristics and proximity of Newark to Roseland, some of those units would have gone to minority applicants. Indeed, plaintiff Laurel Mount would like to live in Roseland. However, the RCA substantially reduced the number of units available to those of low and moderate incomes like Laurel Mount who cannot find affordable housing in Roseland.

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[222] *See id.* COAH's preference occupancy regulation was struck down in *In re Warren II.*

[223] *In re* Warren, 247 N.J. Super. at 168, 588 A.2d at 1239.

[224] *See id.* at 168-69, 588 A.2d at 1239. The court concluded that the Public Advocate failed to establish a prima facie case. The court stated that the prohibition against discrimination in housing had no applicability to RCAs. The appellate court concluded that many decisions made by government could have an impact on race. The court discussed decisions made by government that would impact race and not be discriminatory. This was in error because the court was addressing justification and not the prima facie case. The appellate division blurred the line. First, plaintiff must establish a prima facie case and then the burden shifts to the government to show a compelling, legitimate interest. *See* Resident Advisory Board v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977).

[225] *See Rizzo*, 564 F.2d at 149. *See generally* 42 U.S.C. § 3601(a) (1994).

Such practice violates 42 U.S.C. § 3604(a), because Roseland and COAH, through the RCA mechanism, make units unavailable in suburban areas. Further, 42 U.S.C. § 3615 states that any law of the state or subdivision thereof, that purports to permit any action that would be a discriminatory housing practice shall be invalid. RCAs, a provision in New Jersey's law, allow a community to commit a discriminatory housing practice—that is—racial segregation.

RCAs allow units that should have been built in the suburbs to be sent to cities where there is already a large minority population. This allowance deprives the poor, who are disproportionately minority, of the opportunities and benefits that a suburb like Roseland has to offer its citizens.

The purpose of Title VIII is to integrate neighborhoods; by contrast, RCAs discourage and make housing unavailable.[226] Additionally, the units that are available in the suburbs are being occupied by Whites.

In opposition, Roseland and COAH will argue that RCAs further a legitimate, bona fide interest by rehabilitating substandard housing in Newark.[227] But such interest cannot override a more compelling interest than racial integration.

Newark, like other major cities, is struggling to revitalize itself. This paper does not suggest that Newark is not in need of housing but yet, what types of educational, shopping, recreational, and employment opportunities does Newark offer its citizens? There are less intrusive means of accomplishing housing rehabilitation than denying or making unavailable housing in suburbs where educational, employment, and other opportunities are better.[228]

Newark has named itself the "Renaissance City." In the past ten years, Newark has rebuilt its downtown business area[229] and, recently, has begun to demolish old housing projects. Urban renewal, however, will only serve to push Newark's minorities into smaller, more insulated areas in the city.

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[226] *See In re* Warren, 247 N.J. Super. at 167, 588 A.2d at 1238 ("[T]he Legislature included authorization for RCAs in the [NJ]FHA, it must be presumed to have been aware that such agreements ordinarily would be entered into between suburban municipalities with small minority populations and urban municipalities with substantial minority populations.").

[227] *See id.* at 169, 588 A.2d at 1239.

[228] *See generally* Huntington Branch N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988).

[229] E.g., The Legal Center, One Newark Center, and Prudential Hall.

While Newark is experiencing a "renaissance," it is plagued with the second highest unemployment rate in the country.[230] Newark's median household income is 40% below the national average and over 25% of Newark's residents live below the poverty line.[231] Auto insurance rates in Newark are the highest in the state.[232] In 1995, the State of New Jersey seized control of Newark's school system because of failing test scores[233] and appalling conditions.[234] Recently reported are frightening statistics that put Newark as the most dangerous city in America.[235]

Newark is not unlike other urban areas. A person is twice as likely to be a victim of a crime in an urban area than a suburb.[236] Banks and supermarkets frequently do not locate in urban neighborhoods.[237] In New Jersey, three major cities' school districts have been seized by the state government.[238] Jobs have moved to the suburbs.[239]

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[230] Salvatore Tuzzeo, *New Jersey by the Numbers*, N.J. MONTHLY, Jan. 1997, at 42. Newark's unemployment rate is 14.9%.

[231] Carla Fried, *America's Safest City: Amherst, N.Y.; The Most Dangerous: Newark, N.J.*, MONEY MAG., Nov. 27, 1996, at 22.

[232] Randy Diamond, *More Urban Drivers May Get Insurance But Cancellations Would Increase in Suburbs*, THE RECORD, May 14, 1996, at A03.

[233] Neal Thompson, *Newark Takeover Would Be State's Third, Some Question Benefit to Largest School District*, RECORD, Apr. 15, 1995, at A03. "[S]tudents' test scores are among the state's worst: On the 1994 Early Warning Test for eight-graders, 31.4% passed, less than half the state average of 70.6 %. And 25% of Newark's high school students passed the High School Proficiency Test in 1993, compared with 75% statewide." *Id.*

[234] Carule R. Lucas & Angela Stewart, *School Inspectors Fan Out Across Newark to Catalog the Good, Bad, Ugly*, STAR-LEDGER, July 19, 1995. "Widespread graffiti, minor building code violations, rundown bathrooms . . . damaged ceilings, broken windows . . . were among the problems identified." *Id.*

[235] *See* Fried, *supra* note 231. In Newark, roughly "one out of 25 residents was a victim of a violent crime." In addition, Newark's car theft rate is six times the national average. However, "Newark has 446 police officers per 100,000 residents—nearly twice the national average." *Id.*

[236] *See* Tom Hester, *Gun Use Rises as Crime Falls*, STAR-LEDGER, July 28, 1995 at 1.

[237] *See* Don Stancavish, *Urban Supermarkets in Short Supply, Study Finds Service Gap*, REC. N. N.J., May 17, 1995, at B01 ("Although banks usually receive the harshest criticism for not serving America's urban neighborhoods, . . . millions of Americans pay more for groceries and have fewer choices among fresh and packaged foods because large Supermarkets have abandoned many inner-city neighborhoods.").

[238] *See Takeover Time*, STAR-LEDGER, Feb. 11, 1995, at 28. A Harvard study conducted in 1993 revealed that New Jersey has the fourth highest segregated school system. More than 50% of Black students in New Jersey attend schools that are more than 90% non-White. *See* Nick Chiles, *Englewood Clash Involves Education and Race*, STAR-LEDGER, Oct. 29, 1995, at 22.

[239] *See* Lisa Peterson, *Jersey Baby Boomers Seek Wide-Open Spaces*, STAR-LEDGER, Jan. 20, 1995, at 1. "The key force is job growth along Interstates 287, 78 and 80." *Id.* The U.S. Census indicates that Somerset County had the highest growth. Morris, Warren, Middlesex, Cape May, Atlantic, Bergen, and Passaic counties had some growth but

NJFHA, through RCAs, falls short of meeting the *Mount Laurel* goal—to give the urban poor who are disproportionately Black the chance for opportunities that the middle class in the suburbs have had since before *Mount Laurel I*. Cities, because of their zoning, have provided housing for large number of people, many of whom are poor. Cities, under the guise of urban renewal, continue to bear the brunt of providing housing and services to the poor unlike their suburban counterparts who, because of past zoning practices and RCAs, continue to exclude the poor.

While urban renewal in theory seeks to help the city, in turn helping its residents, in reality, the poor, often Black and Latino, do not benefit from urban renewal. RCAs appear to be facially neutral but they actually bar low to moderate income persons from the suburbs and in so doing exert a racially disproportionate effect on Blacks and Latinos.

Finally, while this paper's purpose is to show how Title VIII can be used to strike down RCAs, it would be remiss not to address possible changes to NJFHA. For example, RCAs should be permitted only if the sending municipality can prove that there is no available land to build low to moderate income homes within its borders, and the sending municipality was in no way responsible for such lack of land because of exclusionary zoning practices.

If the municipality is found responsible for the lack of available land for development, then the municipality must enter into a RCA and must continue to contribute to the receiving municipality for costs incurred for low to moderate income housing.[240] This would include, among other things, the costs of municipal services. The rationale behind such a proposal is that cities are already overwhelmed by their share of the poor. If suburbs, because of their exclusionary zoning practices, have gotten rid of their burden, then those municipalities must also bear the burden of supporting the cities where the poor live because the suburbs will not accept them and provide them with affordable housing. This is the constitutional mandate and the law. In conclusion, some twenty years ago, the New Jersey Supreme Court declared that each of the 567 municipalities in New Jersey must provide their fair share of low to moderate income housing. Unfortunately, as seen in the Study, the impact of this decision

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at a smaller pace. The third highest growth area was Monmouth and Ocean counties. That growth, according to Rutgers School of Planning and Public Policy is because of job opportunities and available housing. Additionally, while other counties remain virtually flat in population increases, Essex and Hudson counties have experienced a decline. *See id.*

[240] Additionally, COAH should monitor the funds that are sent to the receiving municipality to ensure that these funds are being used to build and/or rehabilitate housing for low to moderate income people.

has not significantly changed the composition of New Jersey neighborhoods.

Instead, in 1997, housing advocates and the like are looking toward *Mount Laurel IV*. Perhaps this time, with the use Title VIII, the federal judiciary will hold that RCAs foster segregation and do not comport with federal law and the doctrine of *Mount Laurel*. Finally, RCAs like their predecessor, exclusionary zoning ordinances, encourage and ratify segregation. This does not promote the general welfare but destroys it.