CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Digital Commons @ Boston College Law School

Boston College Environmental Affairs Law Review

Volume 36 | Issue 1 Article 6

1-1-2009

Local Preferences in Affordable Housing: Special Treatment for Those Who Live or Work in a Municipality

Keaton Norquist

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr


Part of the Civil Rights and Discrimination Commons, and the Housing Law Commons

Recommended Citation
Keaton Norquist, *Local Preferences in Affordable Housing: Special Treatment for Those Who Live or Work in a Municipality*, 36 B.C. Envtl. Aff. L. Rev. 207 (2009), http://lawdigitalcommons.bc.edu/ealr/vol36/iss1/6

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

LOCAL PREFERENCES IN AFFORDABLE HOUSING: SPECIAL TREATMENT FOR THOSE WHO LIVE OR WORK IN A MUNICIPALITY?

KEATON NORQUIST*

Abstract: Local governments are increasingly granting preference to local residents and employees when selecting occupants for affordable housing set-asides. These preferences risk being invalidated for three reasons. First, courts could view the preferences as a penalty on non-residents' fundamental right to travel and migration. Second, preferences implemented with the intention of excluding protected classes of persons could violate the Equal Protection Clause. Finally, preferences could violate the Federal Fair Housing Act by creating or perpetuating discriminatory racial impacts. In order to avoid these legal risks, this Note proposes that local governments should structure their affordable housing selection programs as broadly and inclusively as possible. Specifically, local governments should: (1) offer multiple ways for an applicant to receive preference; (2) base the preferences on an expanded geographic area beyond the local government's particular jurisdictional boundaries; and (3) limit the scope and duration of the preferences.

INTRODUCTION

A shortage and uneven distribution of affordable housing has plagued local governments for decades.[1] It is a problem that threatens the economic, environmental, and general quality of life in cities and counties across the nation.[2] Local governments have reacted to the prob-

* Executive Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2008–09. The author would like to thank William B. Fulton for his guidance and suggestion of this Note topic. Mr. Fulton is the President of Solimar Research Group and a Senior Scholar at the School of Policy, Planning, & Development at the University of Southern California.

[1] *See* James B. Goodno, *Affordable Housing: Who Pays Now?*, PLANNING, Nov. 2002, at 4, 4–6. *See generally* Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N, Spring 1998, at 150 (discussing the history of inclusionary housing in California).

[2] *See* David Dillon, *Earning an A for Affordable*, PLANNING, Dec. 2006, at 6, 6–9; *see, e.g.*, Carol J. Williams, *Leaving Key West to the Wealthy*, L.A. TIMES, Feb. 10, 2008, at A17.

lem in a variety of ways.[3] One of the most popular and effective solutions has been the enactment of inclusionary zoning ordinances requiring residential developers to set aside a specified percentage of new units—often ten to fifteen percent—which must be sold or rented at prices deemed affordable to low- and moderate-income households.[4] Another solution is voluntary density bonus incentives, which permit residential developers to build at higher densities than zoning would normally allow in exchange for creating a specified percentage of affordable units.[5] In addition, local governments often team with nonprofit developers to create housing that is set aside for low- and moderate-income households by leveraging local, state, and federal grants through public-private partnerships.[6] Such programs have produced tens of thousands of affordable housing units.[7] These units have historically been available to income-qualified applicants regardless of their residency or occupation.[8]

Local governments are increasingly restricting eligibility for some or all of their affordable housing set-asides.[9] For reasons this Note will explore, many local governments now stipulate—either through explicit ordinances or through unpublished housing program policies—that preference for affordable units shall be given to applicants who currently reside within the government's jurisdiction.[10] Other programs grant preference to individuals who work within a local government's boundaries or are employed in various civic occupations, such as police officers, firefighters, teachers, or nurses.[11]

---

[3] *See* John Emmeus Davis, *Between Devolution and the Deep Blue Sea: What's a City or State to Do?*, *in* A Right to Housing 364, 364 (Rachel G. Bratt et al. eds., 2006).

[4] *See* Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. Envtl. Aff. L. Rev. 383, 385–89 (2006).

[5] *See, e.g.*, Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. Envtl. Aff. L. Rev. 487, 493–94 (2003).

[6] *See, e.g.*, Goodno, *supra* note 1, at 7; Tim Sullivan, *Putting the Force in Workforce Housing*, Planning, Nov. 2004, at 26, 29.

[7] *See, e.g.*, Calavita & Grimes, *supra* note 1, at 150.

[8] *See* Cecily T. Talbert, *California's Response to the Affordable Housing Crisis*, (ALI-ABA Course of Study, Aug. 16–18, 2007), WL SN005 ALI-ABA 1491, 1523.

[9] *See id.*

[10] *E.g.*, Dep't of Neighborhood Dev., City of Boston, Resident Preference Policy in DND-Assisted Housing 1 (2003), *available at* http://www.cityofboston.gov/dnd/pdfs/D_ResidentPreferencePolicyRev8-11-03.pdf; Bonita Brewer, *Livermore Increases Affordable Unit Rules*, Contra Costa Times, Apr. 13, 2005, at F4.

[11] *E.g.*, Brewer, *supra* note 10, at F4; Dep't of Hous. Pres. & Dev., N.Y. City, Housing Programs for Municipal Employees (2008), http://www.nyc.gov/html/hpd/html/apartment/faqs-municipal-employees.shtml (last visited Jan. 23, 2009); League of Cal. Cities, *Local Preference Plan Approved in Thousand Oaks*, Focus on Hous., Dec. 2006, at 2, http://www.cacities.org/resource_files/25219.dec2006.pdf.

This Note examines the legal implications of a local government's decision to operate its affordable housing program in a manner that gives preference to local residents and/or persons employed within its boundaries. Such preferences raise constitutional concerns regarding both infringement upon the fundamental right to travel and violation of equal protection guarantees because of racially discriminatory impacts.[12] In addition, local resident and employee preferences implicate a variety of state and federal statutes.[13] Part I outlines the powerful modern trends that influence local governments to grant preferences. Part II explores the fundamental right to travel. Part III discusses discriminatory racial impacts under the Equal Protection Clause. Part IV investigates how the Federal Fair Housing Act is implicated by housing preferences.[14] Part V analyzes how these legal issues affect local resident and employee preferences.

I. The Rationale for Granting Preferences

A. *Local Resident Preferences*

Local resident preferences are motivated by one of the most basic realities of representative democracy: an elected official's desire to favor her own constituents over those to whom she is not politically accountable.[15] Elected officials simply cannot ignore the dearth of affordable housing in many metropolitan areas.[16] In Washington, D.C., for example, the waitlist for affordable housing currently includes over 57,000 income-qualified families, and it takes several years before an applicant actually receives any form of assistance.[17] Nationwide, several studies suggest that there is a shortage of affordable housing by at least five mil-

---

[12] Heather Gould, *The Legal Tightrope of Local Preferences*, Focus on Hous., June 2006, at 9, *available at* http://www.cacities.org/resource_files/24811.june2006.pdf.

[13] This Note will focus specifically on the Federal Fair Housing Act. However, there are a variety of analogous state statutes that could be implicated. Many state fair housing acts include language that expressly prohibits housing decision makers from considering an applicant's lawful "source of income." *See, e.g.*, Cal. Gov't Code § 12955(a) (West 2008); Conn. Gen. Stat. Ann. § 46a-64c(a)(1) (West 2008); D.C. Code Ann. § 2-1402.21(a) (LexisNexis 2008); Or. Rev. Stat. § 659A.421(1) (2007); Utah Code Ann. § 57-21-5(1) (2000); Wis. Stat. Ann. § 106.50(nm) (West 2007). These statutes ostensibly forbid any type of local employee or civic occupational preference.

[14] 42 U.S.C. §§ 3601–3631 (2000).

[15] *See* James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. Rev. 89, 133 (1993).

[16] *See* Talbert, *supra* note 8, at 1495–96.

[17] Yolanda Woodlee, *Agency Is Updating Housing Aid Wait List*, Wash. Post, Jan. 16, 2008, at B04.

lion units.[18] Given such a disheartening scenario, it is not surprising that locally elected representatives now seek to favor their own constituents over nonvoting outsiders.[19]

There is a perceived problem that desirable communities attract a disproportionate share of nonresident applicants, thereby unfairly burdening low-income applicants who reside in desirable areas because they have to compete for a limited number of affordable housing units against a limitless horde of nonresidents.[20] For instance, in Santa Monica, California, a local newspaper article decried the city's lack of preference for current residents because the affordable housing waitlist was inundated by nonresident applicants.[21] The City of Santa Monica had recently contributed $2.3 million toward an affordable housing development for elderly persons.[22] Of the sixty-five affordable units created, only twelve went to previous Santa Monica residents.[23] Affordable housing units in desirable communities clearly act as magnets, attracting disproportionately large numbers of outsiders.[24] Likely for this reason, the majority of local resident preferences have been implemented by desirable communities, where the perceived ills of being an affordable housing magnet are felt most keenly.[25]

Finally, local governments have an interest in preserving their citizens' residency because continued ties to a community can foster a more stable and involved community over time.[26] Long-term local residents

---

[18] Dillon, *supra* note 2, at 6.

[19] *See* Hartnett, *supra* note 15, at 133.

[20] *See, e.g.*, Teresa Rochester & Jorge Casuso, *Against the Odds: Chances for New Housing Slim for Santa Monica Seniors*, Lookout News (Santa Monica, Cal.), May 12, 2002, *available at* http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2002/May-2002/05_13_02_Chances_for_New_Housing_Slim_for_SM_Seniors.htm.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See, e.g.*, *id.*

[25] *See, e.g.*, Cranston, R.I., Mun. Code § 8.48.010(c) (2006); Marin County, Cal., Code § 22.22.040(D) (2008); Novato, Cal., Mun. Code § 19.24.050(C) (2006); Quincy, Mass., Mun. Code § 17.04.235(D) (2006); Santa Rosa, Cal., Mun. Code § 21-02.050(D) (2006); Dep't of Neighborhood Dev., City of Boston, *supra* note 10, at 1; Telluride, Colo., Hous. Auth., Employee Qualification and Waiting List Policy (2003), *available at* http://www.smrha.org/EmpQuali.pdf; Provincetown, Mass., Local Preference for Affordable Housing (2003), *available at* http://www.provincetowngov.org/affordable/AffHsgPreference.htm.

[26] *See* Patrick C. Jobes, *Residential Stability and Crime in Small Rural Agricultural and Recreational Towns*, 42 Soc. Persp. 499, 500, 508 (1999); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 Science 918, 918 (1997); Robert J. Sampson, *Linking the Micro- and Macrolevel Dimensions of Community Social Organization*, 70 Soc. Forces 43, 45 (1991).

are arguably more likely to invest in a community's continued prosperity and livability than are transitory residents.[27] Some studies suggest that long-term residents take better care of their property, commit less crime, and demonstrate higher levels of civic involvement than do transitory residents.[28]

B. *Local Employee Preferences*

Local employee preferences are supported by a range of urban planning, environmental justice, and even public safety principles.[29] Planners have long extolled the virtues of having "jobs-housing balance" in a community.[30] Indeed, one of the tenets of "smart growth" development is locating people near their places of employment.[31] However, residents of many communities not only have to contend with swelling traffic congestion and commute times, but also find it increasingly difficult to obtain affordable housing close to their places of employment.[32] A balance between housing and jobs in a city confers many benefits, "including reduced driving and congestion, fewer air emissions, lower costs to businesses and commuters, lower public expenditures on facilities and services, greater family stability, and higher quality of life."[33]

It is not just urban planners that advocate jobs-housing balance; the private sector is also a strong supporter. A recent survey of large employers reported that the affordable housing shortage has been problematic for the hiring and retention of entry- and mid-level workers.[34] The survey also reported that entry- and mid-level workers expressed keen interest in moving closer to work if affordable housing were to be made available.[35] Even middle-class jobs no longer guarantee that an employees

---

[27] *See* Sampson et al., *supra* note 26, at 919.

[28] *See id.*

[29] *See* Susan Handy, *The Road Less Driven*, 72 J. Am. Plan. Ass'n 274, 274–76 (2006).

[30] *See* Jonathan Levine, *Rethinking Accessibility and Jobs-Housing Balance*, 64 J. Am. Plan. Ass'n 133, 133–40 (1998).

[31] *See* Jerry Weitz, Jobs-Housing Balance 9 (2003).

[32] Michael Armstrong & Brett Sears, S. Cal. Ass'n of Gov'ts, The New Economy and Jobs/Housing Balance in Southern California 11 (2001), *available at* http://www.scag.ca.gov/Housing/pdfs/balance.pdf; *see also* Robert Cervero & Michael Duncan, *Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing?*, 72 J. Am. Plan. Ass'n 475, 475 (2006); Handy, *supra* note 29, at 276.

[33] Armstrong & Sears, *supra* note 32, at 7; *see also* Handy, *supra* note 29, at 276.

[34] Urban Land Inst., Lack of Affordable Housing Near Jobs: A Problem for Employers and Employees—New Survey from ULI Looks at Impact of Commuting (2007), *available at* http://www.uli.org/sitecore/content/ULI2Home/News/MediaCenter/PressReleases/2007%20archives.aspx (follow hyperlink to title).

[35] *Id.*

will be able to find affordable housing reasonably close to work.[36] Economists note that the shared public and private need for workforce housing was "born of the economic boom of the 1990s," during which time "salaries for the top American earners increased dramatically," while the bottom sixty percent barely kept pace with inflation and home prices doubled.[37]

The burdens of traffic congestion and long commute times do not fall equally on all members of society.[38] Research indicates that both commute times and distances for low-income and minority workers tend to be significantly longer than for other workers.[39] This trend particularly impacts low-wage service workers in desirable communities.[40] Janitorial staff, restaurant workers, and grocery clerks are just a few of the many service workers who are greatly needed to accommodate higher income clientele.[41] However, the lack of affordable housing in desirable communities forces service workers to live in distant locations that are more affordable.[42] "After housing, transportation is now the second [largest] expense for America's families."[43] In addition, the need to own multiple automobiles "is placing homeownership out of reach for many low-income families."[44]

Preferences for vital civic employees also have strong justifications.[45] There are many benefits to having persons employed in certain critical occupations—such as police officers, firefighters, paramedics, and nurses—reside in the locality for which they work.[46] Their continued presence provides models of public service to their neighborhoods, and

---

[36] *See* Sullivan, *supra* note 6, at 26–27.

[37] *Id.* at 26.

[38] *See* Qing Shen, *Spatial and Social Dimensions of Commuting*, 66 J. Am. Plan. Ass'n 68, 68 (2000).

[39] *See id.*

[40] *See* Joint Ctr. for Hous. Studies of Harv. Univ., The State of the Nation's Housing 26–27 (2007), *available at* http://www.jchs.harvard.edu/publications/markets/son2007/son2007.pdf.

[41] *See* Williams, *supra* note 2, at A17.

[42] *See* Sullivan, *supra* note 6, at 27.

[43] Anne Canby, Fannie Mae Found., Affordable Housing and Transportation: Creating New Linkages Benefiting Low-Income Families 1 (2003).

[44] *Id.*

[45] *See, e.g.*, HUD Good Neighbor Next Door Program, http://www.hud.gov/offices/hsg/sfh/reo/goodn/gnndabot.cfm (last visited Jan. 23, 2009). For instance, the Department of Housing and Urban Development, as well as many state housing finance authorities, grant preferences for teachers, firefighters, EMTs, police officers, etc. *Id.*

[46] *See, e.g.*, Christopher Thale, *Assigned to Patrol: Neighborhoods, Police, and Changing Deployment Practices in New York City Before 1930*, 37 J. of Soc. Hist. 1037, 1039 (2004); Gary Polakovic, *Housing Perks on the Rise for Middle Class*, L.A. Times, Apr. 3, 2006, at B1.

they can more readily respond to emergencies than if they had to commute from distant locations and risk delays due to traffic congestion.[47] Local governments across the nation are experiencing great difficulty in filling vital civic positions, due largely to the lack of affordable housing.[48] Some local governments have become so desperate that they provide, at considerable expense, low-interest loans and other fiscal inducements to vital civic employees in exchange for their commitment to reside within the jurisdiction.[49]

Recent downturns in real estate markets are not alleviating the affordable housing crisis for the people who need it the most.[50] It is a sad irony that, despite stagnating and falling home prices, affordable housing is not becoming more available.[51] In fact, the downturn, which has largely been caused by predatory lending practices to minority and low-income populations, has resulted in skyrocketing default and foreclosure rates in many working-class and low-income neighborhoods.[52] Presently, nearly one-quarter of subprime mortgages are in default.[53]

II. Right to Travel & Interstate Migration

Local resident and employee preferences have been frequently challenged, and occasionally invalidated, for violating constitutional principles.[54] Though not specifically enumerated in the Constitution, the Supreme Court has long recognized the fundamental right to travel and interstate migration.[55] Specifically, the Court has interpreted

---

[47] *See* Thale, *supra* note 46; Polakovic, *supra* note 46. Courts have recognized a compelling governmental interest in cases involving municipal requirements that police and firefighters reside within city limits. *See* Krzewinski v. Kugler, 338 F. Supp. 492, 501 (D.N.J. 1972).

[48] *See* Chris Fiscelli, Reason Found., New Approaches to Affordable Housing: Overview of the Housing Affordability Problem 2 (2005); Vaishali Honawar, *School Districts Devising New Ways to Offer Teachers Affordable Housing*, Educ. Week, Aug. 9, 2006, at 1.

[49] *See* Walter Olesky, *A Cop Next Door*, Pol'y Rev., Mar.–Apr. 1996, at 8; Resident Officer Program of Elgin, http://www.cityofelgin.org/index.asp?NID=291 (last visited Jan. 23, 2009).

[50] *See* Joint Ctr. for Hous. Studies of Harv. Univ., *supra* note 40, at 3.

[51] *See id.*

[52] *See* Peter S. Goodman & Vikas Bajaj, *In the Land of Many Ifs*, N.Y. Times, Jan. 2, 2008, at C1; Dean Baker, *The Housing Crash Recession: How Did We Get Here?*, Now on PBS, Mar. 21, 2008, http://www.pbs.org/now/shows/412/housing-recession.html.

[53] Goodman & Bajaj, *supra* note 52, at C1, C6.

[54] *See* Erwin Chemerinsky, Constitutional Law: Principles and policies 864–68 (3d ed. 2006).

[55] S*ee, e.g.*, Saenz v. Roe, 526 U.S. 489, 489–90 (1999) (invalidating a state law that limited new residents' welfare benefits to the level of the state from which the person moved); United States v. Guest, 383 U.S. 745, 746, 757 (1966) (stating that the right to travel and migrate "occupies a position fundamental to the concept of our Federal Union"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 36 (1867) (invalidating a state tax on railroads for the trans-

the Privileges and Immunities Clause of Article IV to protect individuals from unreasonable restrictions on basic rights—including conducting commercial activity and exercising constitutionally protected liberties—when traveling to state or local jurisdictions in which they do not reside.[56] In addition, the Court has most recently interpreted the Fourteenth Amendment to protect the right of individuals to establish residency wherever they choose without being treated differently than longer-tenured residents.[57]

The manner in which a law burdens the fundamental right to travel and migration ultimately determines the level of judicial scrutiny that law will receive.[58] Courts draw an important distinction between

---

portation of people out of state); The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating a state law imposing a tax on aliens arriving from foreign ports).

There is some dispute about whether the Federal Constitution protects an individual's right to intrastate travel. *Compare* Wardwell v. Bd. of Educ., 529 F.2d 625, 625 (6th Cir. 1976) (holding that a right to intrastate travel is not protected by the Federal Constitution) *with* Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) (holding that the Federal Constitution protects the right to intrastate travel through public spaces and roadways). *See generally* Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. Rev. 820 (1992) (discussing the right to intrastate travel). Though the Supreme Court has declined to decide the issue, many lower courts have held that intrastate travel is a logical extension of the right of interstate travel, and thus merits the same degree of constitutional protection. *See, e.g.*, King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648–49 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971); Hawk v. Fenner, 396 F. Supp. 1, 4 (D.S.D. 1975); Wellford v. Battaglia, 343 F. Supp. 143, 147 (D. Del. 1972), *aff'd*, 485 F.2d 1151 (3d Cir. 1973). In *King v. New Rochelle Municipal Housing Authority*, the U.S. Court of Appeals for the Second Circuit invalidated a five-year durational residency requirement for admission to public housing. 442 F.2d at 649. The Housing Authority argued that there was no fundamental right to intrastate travel for the plaintiffs, who had moved from one city in New York State to another. *Id.* at 648–49. However, the court disagreed, concluding that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id.* at 648.

A small minority of lower court decisions reject the existence of a right to intrastate travel. *See Wardwell*, 529 F.2d at 625; Ector v. City of Torrance, 514 P.2d 433, 436–37 (Cal. 1973). However, these cases are distinguishable from local resident and employee preferences because they involve requirements for municipal employees to be residents of the city for which they work. *See Wardwell*, 529 F.2d at 626; *Ector*, 514 P.2d at 433. Additionally, a plaintiff who was not a resident of the state in which he was challenging a local affordable housing preference would be able to invoke interstate travel protections and potentially overturn the policy. *See* Shapiro v. Thompson, 394 U.S. 618, 619 (1969). The existence of a federally protected right to intrastate travel therefore appears of little consequence for the purposes of this Note.

[56] U.S. Const. art. IV, § 2; Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 274 (1985) (invalidating New Hampshire law requiring residence in state prior to being admitted to the bar).

[57] *See Saenz*, 526 U.S. at 490, 502–03.

[58] *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903 n.3 (1986) (Brennan, J., plurality opinion).

laws that grant preferences to residents based upon the length of their residency—durational residency requirements—and laws that merely grant preferences to residents over nonresidents—bona fide residency requirements.[59] Durational residency requirements generally receive strict judicial scrutiny, and therefore will be upheld only upon a showing of a compelling governmental purpose.[60] Bona fide residency requirements, however, are treated with more deference and are upheld if they are rationally related to a legitimate governmental interest.[61]

A. *Durational Residency Requirements*

Some durational residency requirements stipulate that before receiving a certain public benefit a resident must have lived in the jurisdiction for a particular length of time.[62] Previously litigated examples include waiting periods for welfare benefits, voting, divorces, in-state tuition rates, and state-funded nonemergency hospital services.[63] As will be discussed below, courts often apply strict scrutiny to these durational residency requirements because they risk deterring interstate travel and migration.[64]

In *Shapiro v. Thompson*, the leading case invalidating a durational residency requirement, the Supreme Court held a one-year residency requirement for receipt of welfare payments unconstitutional.[65] Following strict equal protection scrutiny, the Court determined that governmental discrimination between newer and longer-tenured residents imposed an unjustified "penalt[y]" on the rights of those who had recently migrated to the state.[66] The Court reasoned that the law discouraged people from moving to the state because "[a]n indigent . . . will doubt-

---

[59] *See id.*

[60] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 250 (1974).

[61] *See* Martinez v. Bynum, 461 U.S. 321, 328 n.7 (1983).

[62] *See* Sosna v. Iowa, 419 U.S. 393, 395 (1975).

[63] *See id.* (upholding law that required one year of residence for citizens to be eligible to divorce); *Mem'l Hosp.*, 415 U.S. at 250 (invalidating law that required one year of residency in the county prior to receipt of non-emergency medical services at the county's expense); Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (invalidating law that required one year of residency to establish voter eligibility); Shapiro v. Thompson, 394 U.S. 618, 618 (1969) (invalidating law that required one year of residency in the state prior to receipt of welfare payments); Starns v. Malkerson, 326 F. Supp. 234, 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971) (upholding law that required new residents to pay higher tuition rates during their first year of residency).

[64] *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 898 (1986) (Brennan, J., plurality opinion).

[65] 394 U.S. at 618.

[66] *Id.* at 638 n.21.

less hesitate [to move] if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute."[67] Because the law deterred migration, it was found to be a "penalt[y]" on nonresidents' right to travel and migration.[68] The government was unable to provide a compelling purpose for the durational residency requirement; budgetary planning and the encouragement of new residents to enter the workforce were found to be insufficient purposes.[69]

The Supreme Court affirmed *Shapiro* five years later in *Memorial Hospital v. Maricopa County.*[70] In that case, the Court applied strict scrutiny to a law that denied government-funded nonemergency hospital services to persons who had not resided in the state for at least one year.[71] Relying more on the basic necessity of medical services than the deterrent effect of the law, the Court held that the law "penalize[d]" migration.[72] The Court found the county's justification for the law—preserving fiscal integrity—insufficient to excuse the penalty it placed on newly arrived residents.[73]

Determining whether strict scrutiny is the appropriate form of analysis ultimately turns on whether the durational residency requirement "penalizes" the exercise of the right to travel and migration.[74] This penalty inquiry is derived from a footnote in *Shapiro* in which the Court limited the scope of its holding:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, *may not be penalties upon the exercise of the constitutional right of interstate travel.*[75]

In *Attorney General v. Soto-Lopez*, a four-vote plurality led by Justice Brennan appeared to adopt this view when it affirmed that a law "implicates the right to travel when it actually deters such travel, when impeding

---

[67] *Id.* at 629.
[68] *Id.* at 638 n.21.
[69] *Id.* at 634, 638.
[70] 415 U.S. 250, 250 (1974).
[71] *Id.*
[72] *Id.*
[73] *Id.* at 263–64.
[74] *See* Westenfelder v. Ferguson, 998 F. Supp. 146, 151 (D.R.I. 1998).
[75] 394 U.S. 618, 638 n.21 (1968) (emphasis added).

travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."[76] However, the *Soto-Lopez* test has never been accepted by a majority of the Supreme Court, making its precedential significance unclear.[77] Furthermore, the Court has not explained precisely what constitutes a "penalty" on the right to travel.[78] Apart from stating that "not all durational residency requirements are penalties," the Court has provided little guidance.[79]

The only durational residency requirements the Supreme Court has reviewed that have not "penalized" the right to travel, and thus received deferential rational basis review, have been limited to the contexts of divorce and in-state tuition benefits.[80] Unlike welfare and free medical aid, the Court inferred that divorce and in-state tuition benefits are not of

---

[76] 476 U.S. 898, 903 (1986) (Brennan, J., plurality opinion) (citations and quotation omitted).

[77] *Westenfelder*, 998 F. Supp. at 151 n.7.

[78] *See Mem'l Hosp.* 415 U.S. at 256–57; *Westenfelder*, 998 F. Supp. at 152.

[79] Sosna v. Iowa, 419 U.S. 393, 418–19 (1975) (Marshall, J., dissenting); *see Mem'l Hosp.*, 415 U.S. at 256–59.

[80] *Sosna*, 419 U.S. at 393; Starns v. Malkerson, 326 F. Supp. 234, 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971). The Court upheld a durational residency requirement for divorce in *Sosna*, 419 U.S. at 393–94. The law in question, which prevented newly arrived residents from obtaining a divorce during their first year of residency, was upheld in part because it was "of a different stripe." *Id.* at 406. In his dissent, Justice Marshall inferred that, unlike welfare benefits, free medical aid, and voting, divorce was not of such fundamental importance that it would be unconstitutional for the State to "condition its receipt upon long-term residence." *See id.* at 419 (Marshall, J., dissenting). It was doubtful that a waiting period for divorce would actually deter any migration. *See id.* at 406. Thus, Justice Marshall's dissent implied that the durational residency requirement did not penalize the right to travel. *Id.* at 418–19 (Marshall, J., dissenting).

The Court summarily upheld a lower court decision that employed similar analysis to *Sosna* in allowing a durational residency requirement for in-state tuition benefits. *Starns*, 326 F. Supp. at 234. In *Starns*, the court found the state law to be distinguishable from *Shapiro* in two important respects. *Id.* at 237. First, the law did not have the specific objective of penalizing migration or travel. *Id.* Second, the law did not deter interstate movement by denying basic necessities to needy residents. *Id.* at 238. As with waiting periods for divorce, it is unlikely that a person would hesitate to migrate due to eligibility requirements for in-state tuition. *Id.* at 237–38. Thus, the court implicitly found that a waiting period for in-state tuition benefits did not penalize the right to travel. *See id.*

In the unique context of voting, the Court has both invalidated and upheld durational residency requirements. For instance, in *Dunn v. Blumstein*, the Court overturned a state law requiring one year of residence in the state, or three months of residence in the county, prior to gaining eligibility to vote. 405 U.S. 330, 330 (1972). However, in *Marston v. Lewis*, it upheld a fifty day requirement. 410 U.S. 679, 681–82 (1973). In both cases, the Court noted that "fixing a constitutionally acceptable [waiting] period is surely a matter of degree." *Marston*, 410 U.S. at 681; *see Dunn*, 405 U.S. at 348. The Court had to balance the state's compelling interest in preventing voter fraud against the risk that too long of a waiting period would penalize migration. *See Marston*, 410 U.S. at 680. Ostensibly, it decided that 50 days was an appropriate threshold. *See id.* at 679.

such fundamental importance that it would be unconstitutional for the State to "condition [their] receipt upon long-term residence."[81] Because the divorce and in-state tuition residency requirements did not deny basic necessities to needy residents, the Court surmised that they were unlikely to actually deter any migration.[82] Thus, the Court implicitly found that a waiting period for these public benefits did not penalize the right to travel and migration.[83]

In addition to invaliding durational residency requirements that completely deny benefits to newly arrived residents, the Court has also invalidated laws that provide less public benefits to new arrivals.[84] For example, in *Zobel v. Williams*, the Court invalidated an Alaska law that distributed state oil revenues through a formula that preferred older residents to newer ones.[85] The Court found Alaska's goal of rewarding older residents for their past contributions insufficient to justify its penalty on the right to travel and migration.[86]

Two other cases are especially helpful in understanding that courts will protect an individual's right to travel and migration even when durational residency requirements do not completely deny benefits to newly arrived residents. In *Soto-Lopez*, the Supreme Court overturned a New York law that gave hiring preference to veterans who were residents of the state when they entered the military; the law gave no preference to veterans who resided in other states immediately prior to their military service.[87] Writing for the plurality, Justice Brennan stated:

> Once veterans establish bona fide residenc[y] . . . they . . . "may not be discriminated against solely on the basis of the date of their arrival in the State." For as long as New York chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services.[88]

In *Saenz v. Roe*, the Court invalidated a law that limited for one year the welfare benefits of new residents to the level of the state from which they

---

[81] *See Sosna*, 419 U.S. at 419 (Marshall, J., dissenting); *Starns*, 326 F. Supp. at 237–38.

[82] *See Sosna*, 419 U.S. at 419 (Marshall, J., dissenting); *Starns*, 326 F. Supp. at 238.

[83] *See Sosna*, 419 U.S. at 406; *Starns*, 326 F. Supp. at 238.

[84] Chemerinsky, *supra* note 54, at 864–66.

[85] 457 U.S. 55, 55 (1982).

[86] *See id.* at 65. Similarly, in *Hooper v. Bernalillo County Assessor*, the Court held that a state law providing property tax exemptions to Vietnam veterans who had become residents of the state prior to a certain date failed simple rational basis review. 472 U.S. 612, 612 (1985).

[87] Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 898 (1986) (Brennan, J., plurality opinion).

[88] *Id.* at 911–12 (quoting *Hooper*, 472 U.S. at 613).

had moved.[89] Writing for the majority, Justice Stevens made it clear that the Court was not persuaded by arguments that the law only partially denied welfare benefits to new residents.[90] The fact that the law penalized their right to travel less than an outright denial of welfare benefits was not dispositive.[91] Rather, because "the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty."[92]

Following *Shapiro*, courts apply strict scrutiny to laws that penalize interstate travel and migration.[93] Because courts often determine whether a law imposes a penalty based on the likelihood that the law will discourage residents from migrating to a jurisdiction, courts are likely to find a penalty when the law restricts basic necessities, such as welfare and medical care, from newly arrived residents.[94] However, the Supreme Court has also recognized penalties in laws that only partially deny nonessential benefits to new residents despite such laws' seemingly decreased likelihood of deterring travel and migration.[95]

B. *Bona Fide Residency Requirements*

Courts show much more deference to bona fide residency requirements than durational residency requirements.[96] Whereas durational residency requirements "treat established residents differently based on the time they migrated into the State," bona fide residency requirements simply provide residents with a public benefit that is not available to nonresidents.[97] Under a bona fide residency requirement, all current residents are eligible for the public benefit and no distinctions are made based on length of residency.[98] Such laws are not generally viewed as penalizing the right to travel and migration.[99]

---

[89] 526 U.S. 489, 489 (1999).

[90] *Id.* at 504–05.

[91] *Id.*

[92] *Id.* at 505. The Court was also unpersuaded by a federal law that expressly allowed states to distinguish welfare benefits between new residents and longer-tenured residents. *Id.* at 508. Congress cannot empower states to violate the Fourteenth Amendment. *Id.*

[93] 394 U.S. 618, 638 n.21 (1969).

[94] *See* Sosna v. Iowa, 419 U.S. 393, 418–19 (1975) (Marshall, J., dissenting); Starns v. Malkerson, 326 F. Supp. 234, 237–38 (D. Minn. 1970).

[95] *See Starns*, 326 F. Supp. at 234.

[96] *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903 n.3 (1986).

[97] *See id.*

[98] *See* Martinez v. Bynum, 461 U.S. 321, 328–29 (1983).

[99] *See id.*

The Supreme Court has repeatedly upheld bona fide residency requirements.[100] In *McCarthy v. Philadelphia Civil Service Commission*, the Court used simple rational basis review when it found constitutional a requirement that municipal employees must reside within city limits as a condition of employment.[101] Likewise, in *Martinez v. Bynum*, the Court upheld a law that denied free public education to nonresident children who lived apart from their parents and were in the school district solely to attend school.[102] The majority in both cases stated that a government can constitutionally restrict eligibility for a public benefit to its bona fide residents.[103] In fact, the *Martinez* court explained that governments have a "substantial . . . interest in assuring that services provided for its residents are enjoyed only by residents."[104] Unlike durational residency requirements that risk penalizing interstate travel and migration, bona fide residency requirements do "not burden or penalize the constitutional right of interstate travel, for any person is free to move to a [governmental jurisdiction] and to establish residence there."[105]

Bona fide resident and employee preferences in affordable housing have been upheld as not violative of the right to travel and migration.[106] In *Fayerweather v. Town of Narragansett Housing Authority*, the U.S. District Court of Rhode Island reviewed a policy that gave preference to both local residents and local employees in the allocation of Section 8 housing vouchers.[107] Citing to *McCarthy* and *Martinez*, the court reviewed the

---

[100] *E.g.*, *id.* at 331. Bona fide residency requirements risk being invalidated when they employ irrebuttable presumptions—governmental classifications which are made without determining the individual merits of a person's residency. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 441 (1973). For instance, in *Vlandis v. Kline*, the Supreme Court overturned a state law requiring students who were not residents when applying for college admission to pay nonresident tuition throughout their education. *Id.* Residents of the state who had established residency after applying for college were barred from receiving in-state tuition benefits, while residents who had been in the state since the time of their application received such benefits. *Id.* In *Vlandis*, the Court pointed to its *Starns* decision, in which it upheld a durational residency requirement allowing students to be eligible for in-state tuition benefits after one year of residency. *Id.* at 452–53 n.9 (citing *Starns*, 326 F. Supp. at 234). Because the law in *Starns* did not perpetually classify students as non-residents, as the law in *Vlandis* did, it did not offend the irrebuttable presumption doctrine. *Id.* at 452–53 n.9.

[101] 424 U.S. 645, 646–47 (1976).

[102] 461 U.S. at 321.

[103] *Id.* at 328; *McCarthy*, 424 U.S. at 647.

[104] 461 U.S. at 328.

[105] *Id.* at 328–29.

[106] Fayerweather v. Town of Narragansett Hous. Auth., 848 F. Supp. 19, 19 (D.R.I. 1994).

[107] *Id.* at 20, 22 n.3.

preferences under rational basis review.[108] The court concluded that the government had a legitimate interest in providing housing for its own residents and employees before aiding residents and employees of other communities; it implied that the preferences did not penalize travel and migration under *Shapiro*.[109]

III. Equal Protection Clause: Facially Neutral Laws with Racially Discriminatory Impacts

The Equal Protection Clause of the Fourteenth Amendment guarantees that no person or class of persons will be denied the same protections of the law that are enjoyed by other persons or classes in similar circumstances.[110] Though challenges to governmental classifications based on equal protection grounds are generally treated with deferential rational basis review, governmental classifications that affect suspect classes or infringe upon fundamental rights are subjected to heightened judicial scrutiny.[111] For instance, a classification that is drawn based on race—a suspect class—or a classification that burdens migration—a fundamental right—will be invalidated unless it is necessary to promote a compelling governmental purpose.[112] However, nonresidents and nonemployees have never been recognized as suspect classes.[113] Likewise, courts have never recognized a fundamental right to affordable housing.[114] Thus, the Equal Protection Clause appears to be an inappropriate vehicle to overturn the facial classifications used for affordable housing allocation.[115]

---

[108] *Id.* at 22.

[109] *See Id.* at 22. In another case that cited *Fayerweather*, the court found that a bona fide residency requirement for a homeless shelter did not violate the right to travel or migration. Family Life Church v. City of Elgin, No. 07 CV 0217, 2007 WL 2790752, at *3 (N.D. Ill. Sept. 24, 2007).

[110] *See* U.S. Const. amend. XIV, § 1.

[111] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–40 (1985). Race, alienage, and national origin are generally held to be suspect classes. *Id.* at 440. The Court has recognized an individual's fundamental right to travel, privacy, marriage, and procreation, though these rights are not specifically enumerated in the Constitution. *See generally* Chemerinsky, *supra* note 54, ch. 10 (describing fundamental rights under the Due Process and Equal Protection Clauses).

[112] *See* Ken Zimmerman & Arielle Cohen, *Exclusionary Zoning: Constitutional and Federal Statutory Responses, in* The Legal Guide to Affordable Housing Development 39, 45 (Tim Iglesias & Rochelle E. Lento eds., 2005).

[113] *See* Chemerinsky, *supra* note 54, ch. 10 (describing fundamental rights under due process and equal protection).

[114] *See* Lindsey v. Normet, 405 U.S. 56, 73–74 (1972).

[115] *See id.*

Though the Equal Protection Clause probably cannot facially invalidate local resident and employee classifications, the discriminatory effects of such policies could theoretically sustain an *as applied* challenge under the Equal Protection Clause.[116] Many laws that do not overtly mention race are nonetheless implemented in a manner that either discriminates against minorities or has a disproportionate impact upon them.[117] However, the Supreme Court has consistently held that discriminatory racial impacts alone are insufficient to sustain an equal protection claim; there must also be proof of purposeful discrimination.[118]

Proving the existence of purposeful discrimination has been an exceedingly difficult undertaking for plaintiffs.[119] Only the most brazen of legislators would state bigoted purposes for their policies.[120] In addition, benevolent motives can be espoused for most laws.[121] "Not only might it be impossible for a court to determine the motivation behind the choices of a group of legislators, but, even if a court could do so, the legislature could presumably lawfully reenact the challenged policy by passing it for different reasons."[122] Thus, the intrinsic difficulties of proving intent can persuade courts to uphold laws despite actual discriminatory intent and impacts.[123]

The Supreme Court articulated three ways through which purposeful discrimination can be proved in its landmark decision *Village of Arlington Heights v. Metropolitan Housing Development Corp* (*Arlington Heights I*).[124] First, a law's impact may be so plainly discriminatory that no nondiscriminatory justification would be possible.[125] Second, the context and

---

[116] *See* CHEMERINSKY, *supra* note 54, at 710.

[117] *Id.*

[118] *See* Washington v. Davis, 426 U.S. 229, 239 (1976); *see also* McCleskey v. Kemp, 481 U.S. 279, 279–80 (1987) (upholding death penalty conviction despite evidence of statistically disproportionate capital punishment convictions due to lack of discriminatory purpose in plaintiff's immediate case).

[119] CHEMERINSKY, *supra* note 54, at 712. When proving purposeful discrimination, a plaintiff must demonstrate that the government acted from a desire to discriminate; legislators' mere knowledge that a policy will have discriminatory consequences is not enough. Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (explaining that purposeful discrimination implies that the government "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

[120] *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108 (1989).

[121] *See id.*

[122] *Id.*

[123] CHEMERINSKY, *supra* note 54, at 712.

[124] 429 U.S. 252, 266–68 (1977) [*Arlington Heights I*].

[125] *Id.* at 266. In *Yick Wo v. Hopkins*, the plaintiff challenged a city ordinance requiring that laundries be located in brick or stone buildings unless a waiver was obtained. 118 U.S.

sequence of events leading up to the challenged policy can indicate purposeful discrimination.[126] Third, the legislative and/or administrative history of a law can reveal explicit discriminatory purposes.[127] Absent purposeful discrimination that can be proved by inexplicably disproportionate effects, obvious contextual circumstances, or barefaced statements, however, the Equal Protection Clause is not suited to overturn a facially neutral law merely because it has discriminatory impacts.[128]

Though discriminatory racial impacts alone are insufficient to establish an equal protection claim, Section Five of the Fourteenth Amendment empowered Congress to legislate against discrimination.[129] It is through such legislation that Congress has enacted a wide range of civil rights laws—including Title VII of the 1964 Civil Rights Act, the 1982 Amendments to the Voting Rights Act of 1965, and the Fair Housing

---

356, 356 (1886). Upon producing evidence that over 200 waiver applications were denied to persons of Chinese ancestry whereas all waiver applications filed by non-Chinese persons were approved, the plaintiff convinced the Court of the city's discriminatory intent. *See id.* at 359. Similarly, in *Gomillion v. Lightfoot*, the plaintiff challenged a government's redrawing of municipal boundaries that excluded virtually all of the city's black voters while excluding not a single white voter. 364 U.S. 339, 339 (1960). The Court was once again persuaded that legislators had acted for no other purpose than racial discrimination. *Id.* Statistical evidence, therefore, can be a powerful tool in demonstrating discriminatory intent. *See* CHEMERINSKY, *supra* note 54, at 716. However, cases such as *Yick Wo* and *Gomillion* are quite rare. *Arlington Heights I*, 429 U.S. at 266 ("Absent a [statistical] pattern [this] stark . . . impact alone is not determinative, and the Court must look to other evidence.").

[126] *Arlington Heights I*, 429 U.S. at 267. For example, in *Guinn v. United States*, the Court invalidated a state law requiring a literacy test for voting that effectively exempted white citizens through a grandfather clause for descendants of those who where eligible to vote in 1866. 238 U.S. 347, 347–48 (1915). Though the law was facially neutral, its historical context made the legislature's discriminatory purpose perfectly clear. *See id.* at 357–58. The Court in *Griffin v. County School Board of Prince Edward County* invalidated a policy that closed public schools in response to desegregation orders, effectively forcing residents to pay for children to attend segregated private schools. 377 U.S. 218, 219 (1964). The facially neutral law's discriminatory purpose was once again ascertained by looking at its historical context. *See id.* at 220–25.

[127] *Arlington Heights I*, 429 U.S. at 268. By examining statements made by lawmakers in the transcripts of their meetings or reports, courts are able to ascertain publicly stated motivations. *See id.* However, the real-world usefulness of this method is most limited because it would take an unusually shameless legislator to openly state a racially discriminatory motive. *See* Ortiz, *supra* note 120, at 1108.

[128] *Arlington Heights I*, 429 U.S. at 266–68. Even if a plaintiff is able to prove the existence of purposeful discrimination through one of the three methods mentioned in *Arlington Heights I*, the law is not immediately invalidated. *Id.* at 270 n.21. Rather, the burden would then shift to the government to prove that it would have taken the same action even if it did not have discriminatory motivation. *Id.* Thus, the government is given an opportunity to articulate a non-discriminatory rationale for its law. *Id.* This burden shifting poses yet another obstacle for potential plaintiffs in a judicial system that appears extremely hesitant to overturn facially neutral laws for violating the Equal Protection Clause. *See id.*

[129] U.S. CONST. amend. XIV, § 5.

Act—which do allow statutory violations to be proved by discriminatory impact apart from discriminatory intent.[130] Thus, a plaintiff who is foreclosed from bringing suit under the Equal Protection Clause for failing to establish purposeful discrimination may still be able to bring suit under a civil rights statute.[131]

IV. The Fair Housing Act

A. *Overview of the Fair Housing Act*

The Fair Housing Act (FHA), which was enacted as Title VIII of the Civil Rights Act of 1968, has been successfully used by plaintiffs seeking to invalidate policies or practices shown to have a discriminatory impact on the basis of race—or another criterion barred by the FHA—without evidence of purposeful discrimination.[132] The FHA prohibits the refusal to rent or sell, or to "otherwise make unavailable or deny," a dwelling to any person "because of" race, religion, sex, familial status, national origin, or disability.[133] In addition to protecting against specific discriminatory actions—such as inequitable advertising practices—the FHA also features relaxed standing requirements for plaintiffs.[134]

---

[130] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3631 (2000); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (2000)); Griggs v. Duke Power Co., 401 U.S. 424, 424 (1971); Ortiz, *supra* note 120, at 1111.

[131] *See* Chemerinsky, *supra* note 54, at 711–12.

[132] 42 U.S.C. §§ 3601–3631; *see* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2nd Cir. 1988) (holding that evidence of discriminatory effect establishes prima facie case, at least for public defendants); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2nd Cir. 1979) (holding that discriminatory effect establishes prima facie case under FHA); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977); *see also* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 986 (4th Cir. 1984); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974); Schmidt v. Boston Hous. Auth., 505 F. Supp. 988, 994 (D. Mass. 1981); Stingley v. City of Lincoln Park, 429 F. Supp. 1379, 1385 (E.D. Mich. 1977).

[133] 42 U.S.C. §§ 3604(a), (c). It is important to note that Congress only intended the FHA to protect the classes that it specifically enumerated in the text. *See* Zimmerman & Cohen, *supra* note 112, at 53–54. Indigent individuals were not mentioned as such a group. *See id.* Thus, FHA litigation attacking local land use and zoning decisions has had to demonstrate disproportionate impacts on one of the classes protected by the FHA. *See id.*

[134] 42 U.S.C. §§ 3604(c), 3610(a), 3612; Ronald S. Javor & Michael Allen, *Federal, State, and Local Building and Housing Codes Affecting Affordable Housing*, *in* The Legal Guide to Affordable Housing Development 162, 197 (Tim Iglesias & Rochelle E. Lento eds., 2005). The text of the FHA states that an "aggrieved person" may initiate an action in order to attain relief from a discriminatory housing practice. 42 U.S.C. § 3610(a)(1)(A)(i). Congress defined "aggrieved person" to include anyone who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a dis-

B. *The Fair Housing Act as a Litigation Tool*

The FHA picks up where courts are reluctant to extend equal protection guarantees because plaintiffs are able to base their challenges solely on a policy's discriminatory impacts.[135] After concluding that equal protection claims require evidence of purposeful discrimination, the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights I*) remanded the case to a federal court of appeals for a finding of FHA violations.[136] Other courts have interpreted this decision to imply that discriminatory impacts alone are sufficient for FHA claims.[137] In *Resident Advisory Board v. Rizzo*, the U.S. Court of Appeals for the Third Circuit explained that although the FHA's "because of race" language might seem to suggest that a plaintiff must show some measure of purposeful discrimination, such a statutory interpretation would raise the plaintiff's burden to the nearly impossible level of equal protection analysis.[138] The *Rizzo* court also noted that, on remand, the court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*) found the "because of race" language not to be unique to Section 3604(a) of the FHA; the same language appears in Title VII of the Civil Rights Act of 1964, which allows a prima facie case to be made by discriminatory effects alone.[139]

The legislative history of the FHA also suggests that Congress intended for discriminatory impacts to suffice in an FHA claim apart from purposeful discrimination.[140] The *Rizzo* court noted that during the Senate floor debate prior to passage of the FHA, several Congressmen spoke of the FHA's importance in eliminating the adverse discriminatory effects of past and present prejudice in housing.[141] In addition, Senator Baker introduced a doomed amendment that would have required proof of discriminatory intent akin to the equal protection

---

criminatory housing practice that is about to occur." *Id.* § 3602(i). This broad definition ostensibly overrides the traditional prudential limitations on standing, which prevent plaintiffs from resting their claims on third parties without asserting their own legal rights or interests. *See id.* While an "aggrieved person does not necessarily have to be the person discriminated against," an FHA plaintiff must always satisfy constitutional standing requirements under Article III of the Constitution. *See* Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 294 (7th Cir. 2000); Growth Horizons, Inc. v. Del. City, 983 F.2d 1277, 1282 n.6 (3rd Cir. 1993).

[135] *See* Zimmerman & Cohen, *supra* note 112, at 56.

[136] 429 U.S. 252, 271 (1977).

[137] *Rizzo*, 564 F.2d at 147; *Schmidt*, 505 F. Supp. at 994.

[138] *See* 564 F.2d at 146–47.

[139] *Id.* at 147; *see* 42 U.S.C. § 2000e-2(h) (2000).

[140] *Rizzo*, 564 F.2d at 147.

[141] *Id.*; *see* 114 Cong. Rec. 3421 (1968) (statement of Sen. Mondale).

standard in all FHA claims.[142] This amendment was rejected, as Senator Percy voiced the opposition's concern about the virtually insurmountable burden it would impose on plaintiffs.[143]

C. *Discriminatory Effects Under the Fair Housing Act*

The Supreme Court has not decided how courts should analyze whether a particular discriminatory impact constitutes a violation of the FHA.[144] Lower courts have taken varied approaches.[145] In *Arlington Heights II*, the U.S. Court of Appeals for the Seventh Circuit stated that not "every action which produces discriminatory effects is illegal [under the FHA]."[146] In a move that was later followed by the Fourth Circuit, the *Arlington Heights II* court created a test to examine the following factors: (1) how strong the plaintiff's showing of discriminatory effect is; (2) whether there is some evidence of discriminatory intent; (3) what the defendant's interest is in taking the action complained of; and (4) whether the plaintiff seeks to either compel the defendant to affirmatively provide housing for minorities, or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.[147] It seems counterintuitive that a test designed to measure discriminatory impact alone would include the second factor, which examines evidence of discriminatory intent.[148] However, the court noted that the controversial second factor was the least important and that "too much reliance on this evidence would be unfounded."[149] The Sixth Circuit has adopted a modified *Arlington Heights II* approach that completely abandons the second factor.[150]

The majority of the remaining circuits do not follow the multifactor approach of *Arlington Heights II*. Instead, they follow a prima facie approach, meaning that "proof of discriminatory effect alone is always sufficient to establish a violation of the [FHA]."[151] In *Huntington Branch, NAACP v. Town of Huntington*, the U.S. Court of Appeals for the Second Circuit criticized the *Arlington Heights II* factors because they

---

[142] 114 Cong. Rec. 5221–22 (1968).

[143] *Id.*; *see Rizzo*, 564 F.2d at 147.

[144] *See* Zimmerman & Cohen, *supra* note 112, at 56.

[145] *See id.*

[146] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) [*Arlington Heights II*], *cert. denied*, 434 U.S. 1025 (1977).

[147] *Id.*

[148] *See id.* at 1292.

[149] *Id.*

[150] *See* Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986).

[151] Keith v. Volpe, 858 F.2d 467, 482 (9th Cir. 1988).

"place[d] too onerous a burden on [plaintiffs]."[152] It then noted that the legislative history of the FHA argues against such a "daunting . . . standard."[153] The chief difference between the multifactor and prima facie approaches involves the government's burden of proof in justifying its actions.[154] In multifactor jurisdictions, plaintiffs bear the burden of demonstrating that the government can achieve its objectives through a less discriminatory alternative.[155] In more lenient prima facie jurisdictions, the plaintiff establishes an FHA claim once proof of discriminatory effect is shown; the burden then shifts to the government to prove first that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest, and second, that no alternative would serve that interest with less discriminatory impact.[156]

All courts recognize two basic types of discriminatory effects.[157] First, a decision can have a greater adverse impact on one protected group than another.[158] This type of discriminatory effect can be demonstrated by statistical demographic information.[159] The court in *Huntington Branch, NAACP* suggested that plaintiffs should focus on "proportional statistics" instead of "absolute numbers."[160] In that case, although a greater number of whites were below the poverty line, nonwhites were proportionately poorer.[161] The second type of discriminatory effect occurs when a government policy perpetuates segregation.[162] In *United States v. City of Black Jack*, the U.S. Court of Appeals for the Eighth Circuit invalidated a city ordinance prohibiting the construction of any new multifamily dwellings.[163] The court found that the plaintiff's prima facie case was satisfied upon showing that exclusion of townhouses would "contribute to the perpetuation of segregation in [the city]."[164]

---

[152] 844 F.2d 926, 935–36 (2nd Cir. 1988).

[153] *Id.* at 936.

[154] *See* Duane J. Desiderio et al., Fair Housing Act Primer, (ALI-ABA Course of Study, Aug. 16–18, 2007), WL SN005 ALI-ABA 61, 82.

[155] *See id.*

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

[157] Zimmerman & Cohen, *supra* note 112, at 56.

[158] *See id.*

[159] *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2nd Cir. 1988).

[160] *Id.*

[161] *See id.*

[162] United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974).

[163] *Id.* at 1188.

[164] *Id.* at 1186.

D. *Local Resident Preferences Under the Fair Housing Act*

Even in jurisdictions that follow the more onerous multifactor test, plaintiffs have successfully used the FHA to invalidate bona fide residency requirements for affordable housing.[165] In *United States v. Housing Authority of Chickasaw*, the U.S. Department of Justice (DOJ) brought suit against the city of Chickasaw, Alabama for using a bona fide residency requirement in its public housing program.[166] The DOJ provided statistical evidence that the residency requirement resulted in a public housing facility that never housed any African American tenants despite being located in Mobile County, which had a large African American population.[167] The district court found both types of discriminatory impact: the residency requirement had a greater adverse impact on African Americans than whites since it had the effect of excluding all nonwhites, and the requirement perpetuated the segregation of the community because it discouraged neighboring African Americans from integrating into Chickasaw.[168]

Upon balancing the four *Arlington Heights II* factors, the *Chickasaw* court concluded that the city's bona fide resident requirement violated the FHA due to its discriminatory effects.[169] The court stated that it is required to "decide close cases in favor of integrated housing."[170] However, the court was careful to note that not all affordable housing resi-

---

[165] *E.g.*, United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 716 (S.D. Ala. 1980).

[166] *Id.* at 726.

[167] *Id.* at 717–18.

[168] *Id.* at 730. The *Chickasaw* court next employed the second *Arlington Heights II* factor in determining whether there was some evidence of purposeful discrimination. *Id.* at 731. Though it noted there was no evidence of discriminatory intent, the court repeated a Seventh Circuit opinion which stated that discriminatory intent need not be shown in order to prove a violation of the FHA. *Id.* In examining the city of Chickasaw's governmental interest, the court did not mention whether there were less discriminatory alternatives available. *See id.* at 731–32. Instead, it merely stated that the city "was acting within the ambit of its [state-derived] authority when it adopted the residency requirement" as it found the third factor to weigh heavily in favor of the city. *Id.* Under the fourth factor, the court credited the DOJ for not seeking to require Chickasaw to affirmatively house minorities. *Id.* at 732. Rather, it was merely seeking to invalidate Chickasaw's residency requirement. *Id.*

[169] *Chickasaw*, 504 F. Supp. at 733. Interestingly, the DOJ also attacked the bona fide residency requirement as violative of the fundamental right to travel and migration. *Id.* at 732–33. However, because the case was decided on statutory grounds, there was no need for the court to go into Constitutional analysis. *Id.* at 733.

[170] *Id.* at 732 (quoting *Arlington Heights II*, 558 F.2d 1283, 1294 (7th Cir. 1977)).

dency requirements are per se violations of the FHA; such policies may serve a valid public purpose.[171]

V. The Legality of Local Resident and Employee Preferences in Affordable Housing

A local government that operates its affordable housing program in a manner that gives preference to local residents and/or persons employed within its boundaries risks offending the fundamental right to travel and migration, the Equal Protection Clause, and the Fair Housing Act.[172] The potential legal problems associated with both types of prefer-

---

[171] *Id.* at 731. Another case is helpful in understanding why a court would overturn a local resident or employee preference for violating the FHA. As in *Fayerweather v. Town of Narragansett Housing Authority*—see discussion *supra* Part II.B—*Langlois v. Abington Housing Authority* involved a challenge to Section 8 voucher preferences for those who lived in the jurisdiction. *See* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 33 (D. Mass. 2002). Unlike *Fayerweather*, in which the plaintiff unsuccessfully challenged the preferences as violative of the right to travel and migration, the *Langlois* complaint focused on a statutory FHA challenge. *See id.*; *see also* Fayerweather v. Town of Narragansett Hous. Auth., 848 F. Supp. 19, 19 (D.R.I. 1994).

Despite no evidence of purposeful discrimination, the district court inferred that the combination of a local preference and severe ethnic and racial differences between Abington, Massachusetts and nearby Boston created discriminatory racial impacts. *See Langlois*, 234 F. Supp. 2d at 43, 66. Under *Huntington Branch, NAACP*, this evidence shifted the burden to the town of Abington to prove that there were no less discriminatory alternatives available. 844 F.2d 926, 936 (2nd Cir. 1988). Noting the similarities to *Huntington Branch, NAACP*, the district court then concluded that Abington failed to demonstrate that no less discriminatory alternatives were available. *Langlois*, 234 F. Supp. 2d at 70. Thus, the preferential policies were invalidated under the FHA. *Id.* at 78.

Prior to *Langlois*, which was at the district court level on remand, the First Circuit Court of Appeals had upheld the local resident requirements due largely to a federal statute permitting such preferences in Section 8 vouchers. Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000); *see* 42 U.S.C. § 1437f(o)(6) (2000). The court concluded that "[i]t is hard not to treat Congress's own [permission] as justification enough to satisfy a statutory impact discrimination claim of the kind before us." Langlois v. Abington Hous. Auth., 207 F.3d at 51. Absent express congressional permission, the district court's invalidation of the resident preferences would presumably have been affirmed. *See Chickasaw*, 504 F. Supp. at 732. Thus, because there is no congressional authorization for local resident preferences in non-Section 8 and other municipal housing programs, the FHA appears fully capable of invalidating local resident preferences in local affordable housing programs. *See id.; Langlois*, 234 F. Supp. 2d at 78.

The FHA has also been used to invalidate employee preferences in affordable housing. In *Davis v. New York City Housing Authority*, the Second Circuit upheld a district court injunction against a working family preference due to its disparate racial impacts. 278 F.3d 64, 76, 88 (2nd Cir. 2002). However, the preference was for working families in general, and did not favor local employees. *See id.* at 68–69.

[172] *See supra* text accompanying notes 93–96, 125–29, 166–71. A variety of state laws that could be implicated by local resident and employee preferences lie beyond the scope of this Note. *See supra* note 13. In addition, when funds from the U.S. Department of Housing and

ence, as well as suggestions for structuring lawful programs, are discussed below.

A. *Local Resident Preferences in Affordable Housing*

1. Right to Travel and Migration

a. Durational Resident Preferences

Because courts apply strict scrutiny to durational residency requirements, an affordable housing policy that grants preference to local residents based on the length of their residency would almost certainly be challenged and overturned as violative of the fundamental right to travel and migration.[173] It is true that a durational *preference* would be less onerous than an absolute *requirement*; depending on how the preference was implemented, such a policy would not completely deny the public benefit to outsiders or newly arrived residents.[174] However, a durational resident preference would probably be invalidated for two reasons. First, following *Saenz v. Roe*, courts are not receptive to the argument that a policy only partially denies benefits to new residents and should thus be treated with more deference.[175] Second, in the spectrum of durational residency requirements that have been challenged, a reviewing court would probably determine that affordable housing is a basic necessity, more similar to welfare and hospital care than divorce or in-state tuition benefits.[176] Thus, under *Shapiro v. Thompson* and its progeny, a durational preference for local residents would be seen as a penalty on the fundamental right of outsiders to migrate to the challenged jurisdiction.[177] A reviewing court would

---

Urban Development (HUD) or similar state agencies are used in an affordable housing development, preferences may conflict with agency policies. *See generally* Henry Korman, Citizens' Hous. and Planning Ass'n, Meeting Local Housing Needs: A Practice Guide for Implementing Selection Preferences and Civil Rights Requirements in Affordable Housing Programs (2004), *available at* http://www.chapa.org/files/f_1220549146LocalHousingNeedsReport.pdf (outlining various agency policies that both approve and prohibit local resident and employee preferences in affordable housing).

[173] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 258 (1974); Shapiro v. Thompson, 394 U.S. 618, 618–19 (1969).

[174] *See* Saenz v. Roe, 526 U.S. 489, 504–05 (1999).

[175] *See id.*

[176] *See* Sosna v. Iowa, 419 U.S. 393, 419 (1975) (Marshall, J., dissenting); *Mem'l Hosp.*, 415 U.S. at 256–57; *Shapiro*, 394 U.S. at 629; Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

[177] *See Sosna*, 419 U.S. at 419 (Marshall, J., dissenting); *Mem'l Hosp.*, 415 U.S. at 256–57; *Shapiro*, 394 U.S. at 638 n.20; *Starns*, 326 F. Supp. at 238.

likely follow strict scrutiny and invalidate the durational preference upon determining that less restrictive means—such as local recruitment and advertising schemes—are able to accomplish the governmental purposes behind the preference.[178]

b. Bona Fide Resident Preferences

Though courts have consistently upheld bona fide residency requirements against challenges based on the right to travel and migration, a bona fide resident preference unaccompanied by some other broadening qualification could be invalidated.[179] The chief reason that courts give deference to bona fide residency requirements is that "any person is free to move" to a locality and "establish residence" in order to receive a public benefit.[180] Because all residents are eligible for the public benefit without regard to length of residency, there is no penalty on nonresident travel or migration.[181] However, affordable housing is unlike other public benefits. It is logically infeasible for a person to move to a locality unless they can first afford to live there. Bona fide residency preferences in affordable housing consequently pose an immense risk of deterring indigent nonresidents from migrating and establishing residency.[182] Upon challenge, a reviewing court could determine that such preferences are prohibitively burdensome on low-income nonresidents' fundamental right to travel and migration.[183]

Bona fide resident preferences should be structured as broadly and inclusively as possible in order to avoid potential challenges based on the right to travel and migration.[184] In particular, resident preferences should be accompanied by local employee preferences and/or other broadening qualifications.[185] In giving indigent nonresidents a legitimate opportunity to receive affordable housing benefits through alternative processes, not merely residency alone, local governments would reduce the risk of deterring or penalizing migration.[186] In *Fayerweather v.*

---

[178] In *Langlois v. Abington Housing Authority*, the court mentioned that a local recruitment and advertising scheme would be a less restrictive alternative to residency requirements. *See* 234 F. Supp. 2d 33, 70 (D. Mass. 2002).

[179] *See* Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (Brennan, J., plurality opinion); Martinez v. Bynum, 461 U.S. 321, 328–29 (1983).

[180] *Martinez*, 461 U.S. at 328–29.

[181] *See id.*

[182] *See id.*

[183] *See id.*

[184] *See* Gould, *supra* note 12, at 9.

[185] *See id.*

[186] *See id.*

Town of Narragansett Housing Authority, the court credited the breadth of the city's affordable housing policy, which gave preference to both local residents and local employees.[187] The court determined that such inclusive preferences do not penalize or violate a nonresident's right to travel and migration.[188] In addition to having a local employee preference complement its local resident preference, a local government might also broaden its preferred applicant pool by extending affordable housing preferences to a geographic area beyond its jurisdiction.[189] For instance, a city could grant preference to all persons who live or work in the surrounding county.[190] Expanded geographic preferences increase the likelihood that indigent nonresidents can become residents in order to qualify for the public benefit, thereby reducing the risk of deterring or penalizing nonresident travel and migration.[191]

2. Equal Protection Clause

It is extremely unlikely that a local resident preference would be overturned for violating the Equal Protection Clause on the basis of discriminatory effects.[192] Indeed, it has never happened. While local resident preferences can clearly cause or perpetuate disparate racial impacts, particularly in localities surrounded by greater racial diversity, equal protection jurisprudence requires a challenger to prove that the government was motivated by a desire to discriminate.[193] In practical terms, the test expressed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights I*) demands that a plaintiff demonstrate purposeful discrimination through unexplainable and egregious disproportionate effects, obvious contextual circumstances, or statements of legislators.[194] Only in the most exceptional of scenarios would this be possible.[195] Courts are consequently hesitant to overturn

---

[187] *See* 848 F. Supp. 19, 22 n.3 (D.R.I. 1994).

[188] *Id.* at 22.

[189] KORMAN, *supra* note 172, at 80; Gould, *supra* note 12, at 9.

[190] KORMAN, *supra* note 172, at 80; Gould, *supra* note 12, at 9. It is worth noting that if federal funds are involved in an affordable housing development, some federal regulations prohibit geographic preference areas smaller than the local government itself. *See, e.g.*, 24 C.F.R. § 5.655(c)(1) (2007) (Section 8 housing); 24 C.F.R. § 960.206(b)(1)–(3) (2007) (public housing); 24 C.F.R. § 982.207(b)(1)–(3) (2007) (multifamily housing); *see also* KORMAN, *supra* note 172, at 39 n.29.

[191] *See* KORMAN, *supra* note 172, at 80; Gould, *supra* note 12, at 9.

[192] *See supra* notes 116–28 and accompanying text.

[193] *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976); United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (discussing perpetuation of segregation).

[194] *See* 429 U.S. 252, 266–68 (1977).

[195] *See supra* notes 120–24 and accompanying text.

facially neutral laws, such as local resident preferences, on the grounds that they violate the Equal Protection Clause.[196]

3. Fair Housing Act

The FHA and other civil rights laws were originally enacted in order to prevent discrimination against protected classes of people.[197] These same laws apply to local governments seeking to serve their own residents in affordable housing programs.[198] Congress deliberately removed from the FHA a plaintiff's difficult burden of proving purposeful discrimination that is present in equal protection claims.[199] Instead, a plaintiff must only demonstrate that a local resident preference creates or perpetuates a discriminatory impact.[200] Thus, of all the legal risks to local resident preferences discussed in this Note, an FHA claim is perhaps the easiest for plaintiffs to bring and the most difficult for local governments to defend.[201]

It is regrettable that residential segregation still characterizes many of America's metropolitan regions.[202] Discrimination takes numerous forms and comes from a variety of institutions.[203] Overt harassment and violence, income inequality, exclusionary zoning, prejudiced mortgage lending, and bigoted home sales and rentals are just a few of the many practices that have contributed to modern residential segregation.[204] However, even the most blameless of local governments cannot ignore regional racial imbalances.[205] When racial imbalances exist, the resulting discriminatory effects of a local resident preference can be obvious. In a predominantly white municipality, for example, a local resident preference would disproportionately benefit whites while excluding other races from affordable housing.[206] The preference would also perpetuate

---

[196] *See id.*

[197] Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3631 (2000).

[198] *See, e.g.*, Fayerweather v. Town of Narragansett Hous. Auth., 848 F. Supp. 19, 20 (D.R.I. 1994).

[199] *See supra* notes 141–44 and accompanying text.

[200] *See* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974).

[201] *See* Gould, *supra* note 12, at 9.

[202] *See* Nancy A. Denton, *Segregation and Discrimination in Housing*, *in* A Right to Housing 61, 62 (Rachel G. Bratt et al. eds., 2006).

[203] *See id.* at 69.

[204] *See generally id.* (describing many of the causes of racial segregation in housing).

[205] *See* Gould, *supra* note 12, at 9.

[206] *See id.*

existing segregation by discouraging neighboring nonwhites from integrating into the municipality.[207]

An FHA claim against a local government's resident preference is likely to succeed when the locality is significantly more homogenous than its surrounding region.[208] In considering whether a local resident preference has a disparate impact, courts compare the demographics of the locality to the demographics of the surrounding region.[209] In the FHA claim presented in *Langlois v. Abington Housing Authority*, the court borrowed a statistical test known as the "four-fifths rule," which is used by the Federal Equal Employment Opportunity Commission (EEOC), to measure disparate impact in employment practices.[210] According to the four-fifths rule, "[a] selection rate for any race . . . which is less than four-fifths . . . (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[211] This test can be a useful guideline for local governments as they monitor their affordable housing programs; however, there is ultimately no bright-line statistical test for determining disparate impact.[212] Other courts have used somewhat different tests.[213]

Once a plaintiff has demonstrated that a local resident preference causes or perpetuates a disparate racial impact, courts take varying approaches in determining whether the disparate impact violates the FHA.[214] The minority of courts adhere to the multifactor test outlined in *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*).[215] Under this test, the plaintiff bears the burden of demonstrating that the government can achieve its objective through a less discriminatory alternative.[216] Most courts follow a prima facie approach, meaning that the local government must justify disparate im-

---

[207] *See* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974); United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 730 (S.D. Ala. 1980).

[208] *See Chickasaw*, 504 F. Supp. at 730.

[209] *See* Gould, *supra* note 12, at 9.

[210] 234 F. Supp. 2d 33, 57 (D. Mass. 2002); *see* KORMAN, *supra* note 172, at 74–75 ("The rule is intended to gauge the discriminatory effect of selection from within an existing pool of qualified candidates.").

[211] *Langlois*, 234 F. Supp. 2d at 57 (quoting 29 C.F.R. § 1607.4(D) (2002)).

[212] *See* KORMAN, *supra* note 172, at 74.

[213] *See, e.g.*, Summerchase Ltd. P'ship v. City of Gonzales, 970 F. Supp. 522, 528–30 (M.D. La. 1997) (comparing the absolute number of minorities receiving the benefit to the absolute number of minorities who were eligible).

[214] *See supra* notes 144–55 and accompanying text.

[215] *See id.*

[216] *See id.*

pacts by demonstrating that it has a compelling purpose and that no less discriminatory alternatives are available.[217] Regardless of which party bears the burden, a plaintiff would likely be successful in arguing that local zoning and planning policies contribute to the unaffordability of housing; simply removing the zoning and planning policies would be a less discriminatory alternative and would allow unregulated growth to create affordable housing opportunities for residents and nonresidents alike.[218] Such laissez-faire development would be highly undesirable for most local governments.[219]

The risk that local resident preferences will create or perpetuate a disparate impact, coupled with the difficulty of defending such an occurrence, should convince local governments that it is necessary to extend preferences beyond only current residents.[220] As with right-to-travel concerns, local governments would be wise to extend preferences to households that have a member who works in the jurisdiction.[221] Additionally, a locality could reduce the risk of a disparate impact by extending preferences to residents of a more diverse surrounding geographic area, such as a county.[222] Expanded preferences increase the ethnic diversity of the preferred applicant pool, thereby reducing the risk of creating or perpetuating a disparate racial impact.[223]

Finally, it may be possible to mitigate a discriminatory impact through the use of partial preferences. For example, a local government could require developers to grant preference to local residents in fifty percent of their affordable housing set-asides, rather than the entire stock.[224] Additionally, developers could be required to grant local resident preferences only when filling initial vacancies.[225] Selection of subsequent occupants could be based on income alone, without regard to residency.[226] Both of these partial preferences would reduce the risk of creating or perpetuating discriminatory racial impacts.[227]

---

[217] *See id.*
[218] *See* Lerman, *supra* note 4, at 386–88.
[219] *See id.* at 387.
[220] *See* KORMAN, *supra* note 172, at 77; Gould, *supra* note 12, at 9.
[221] *See* Gould, *supra* note 12, at 9.
[222] KORMAN, *supra* note 172, at 80; Gould, *supra* note 12, at 9.
[223] *See* Gould, *supra* note 12, at 9.
[224] KORMAN, *supra* note 172, at 79.
[225] *Id.*
[226] *See id.*
[227] *See id.*

B. *Local Employee Preferences in Affordable Housing*

1. Right to Travel and Migration

Local employee preferences in affordable housing, by themselves, do not resemble any preferences that have ever been challenged as violating the right to travel and migration.[228] Unlike residency preferences that risk preventing indigent nonresidents from migrating because they cannot afford to live in the jurisdiction—and consequently cannot receive preference in affordable housing—employee preferences are unlikely to offend the right to travel because employment is more easily attainable.[229] Nonetheless, local employee preferences should be extended not just to persons currently employed in the jurisdiction, but also to persons who have offers of employment in the jurisdiction.[230] The inclusiveness of such a preference would reduce the risk of deterring or penalizing nonresident migration, and would most likely receive deferential rational basis review if challenged.[231] A local government would have a variety of reasonable justifications for local employee preferences in affordable housing, including the desire to reduce traffic congestion, long commute times, noise, poor air quality, and other negative environmental impacts.[232] Preferences for employees in vital occupations could be justified by compelling public safety interests.[233]

2. Equal Protection Clause

It is extremely unlikely that a local employee preference would be overturned for violating the Equal Protection Clause on the basis of discriminatory effects.[234] Not only would the discriminatory impact of employee preferences be less direct than resident preferences—which themselves probably could not sustain an equal protection claim—but the indirect racial impacts of employee preferences would make them an unlikely tool for bigoted legislators to use with the intention of exclud-

---

[228] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 393 (1975); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 250 (1974).

[229] *See* Martinez v. Bynum, 461 U.S. 321, 329 (1983).

[230] *See* KORMAN, *supra* note 172, at 79–80; Gould, *supra* note 12, at 9.

[231] *See Martinez*, 461 U.S. at 328–29; *Sosna*, 419 U.S. at 419 (Marshall, J., dissenting).

[232] In *County Board of Arlington County v. Richards*, the Supreme Court used rational basis review to uphold a parking ordinance that favored local residents on similar grounds. 434 U.S. 5, 5 (1977) (per curium).

[233] *See* Krzewinski v. Kugler, 338 F. Supp. 492, 501 (D.N.J. 1972).

[234] *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

ing a protected class.[235] A court would be much more willing to find a violation of a civil rights statute, such as the FHA.[236]

3. Fair Housing Act

Though less direct than local resident preferences in segregated regions, local employee preferences also risk creating and perpetuating disparate racial impacts in violation of the FHA.[237] Even if local employers have hiring practices that are nondiscriminatory, a jurisdiction's local employees can still be characterized by homogenous races or genders.[238] Likewise, vital civic occupations, such as teachers, police officers, and firefighters, frequently have a racial or gender makeup that is not wholly representative of the area's demographics.[239] In such cases, one or more groups may be able to challenge a local employee preference based on its disparate impacts.[240] A challenger would have a persuasive argument that less discriminatory means are available to achieve the government's purpose.[241] Rather than giving preference to local employees in affordable housing, a government could provide low-interest loans and other fiscal inducements in exchange for employees' commitments to live in the jurisdiction, a practice that is already common in many cities.[242] Both multifactor and prima facie jurisdiction courts would have a difficult time ignoring such a less- discriminatory alternative.[243]

It is again imperative that local employee preferences be structured as broadly and inclusively as possible in order to avoid an FHA violation.[244] In addition to expanding the preferred geographic employment area, a locality should also ensure that a broad swath of local employees is given preference.[245] For instance, a preference for local teachers should be expanded to include all employees of the school district, in-

---

[235] *See id.*

[236] *See* United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974).

[237] *See* Davis v. N.Y. City Hous. Auth., 278 F.3d 64, 88 (2d Cir. 2002).

[238] *See* Leslie McCall, *Sources of Racial Wage Inequality in Metropolitan Labor Markets: Racial, Ethnic, and Gender Differences*, 66 Am. Soc. Rev. 520, 521–24 (2001) (discussing causes of racial concentration in cities).

[239] *See* Norma M. Riccucci, Managing Diversity in Public Sector Workforces 36–37 (2002).

[240] *See Davis*, 278 F.3d at 88; Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2nd Cir. 1988).

[241] *See Huntington Branch, NAACP*, 844 F.2d at 936.

[242] *See supra* notes 48–49 and accompanying text.

[243] *See Huntington Branch, NAACP*, 844 F.2d at 936; *Arlington Heights II*, 558 F.2d 1283, 1290 (7th Cir. 1977).

[244] *See* Korman, *supra* note 172, at 79–80; Gould, *supra* note 12, at 9.

[245] *See* Korman, *supra* note 172, at 79–80.

cluding janitorial staff and other lower-wage earners.[246] By increasing the diversity of preferred applicants, expanded employment preferences decrease the likelihood of creating or perpetuating disparate racial impacts.[247]

Conclusion

There is a growing trend of local governments allocating affordable housing set-asides in a manner that favors local residents and/or local employees. Such preferences are threatened by three chief legal principles. First, courts may view the preferences as a penalty on nonresidents' fundamental right to interstate travel and migration. Second, if the preferences are motivated by legislators' desire to exclude a protected class of persons, courts may conclude that the preferences violate the Equal Protection Clause. Finally, local resident and employee preferences can violate the Federal Fair Housing Act by creating or perpetuating discriminatory racial impacts. Such violations require no proof of discriminatory intent on behalf of legislators.

In order to avoid these legal risks, local governments should structure their affordable housing programs as broadly and inclusively as possible. By offering multiple methods for an applicant to receive preference—such as preferences based on bona fide residency, employment, and expanded geographic areas—and by limiting the scope and duration of the preferences, a local government would decrease the likelihood of penalizing nonresident migration while simultaneously decreasing the likelihood of creating or perpetuating discriminatory racial impacts.

---

[246] *See id.*

[247] *See id.* It is also possible that local employment preferences could be challenged for creating a disparate impact upon disabled persons, who are another class of persons protected by the FHA. 42 U.S.C. § 3605 (2000). A disabled person may not be physically able to work in any occupation, or may not meet the high standards for a vital civic occupation. Under such a challenge, it would be difficult for the local government to maintain that it was not a plaintiff's disability that disqualified her for the preference, but, rather, her employment status. A local government would probably be wiser to simply create a policy exemption for disabled persons under its local employee preference. *See* Korman, *supra* note 172, at 73–74. By also granting preference to disabled persons, a local government would avoid disparate disability impacts without significantly departing from the original intent of the preference. *See id.*