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THE EQUAL PROTECTION CLAUSE AND THE FAIR HOUSING ACT: JUDICIAL ALTERNATIVES FOR EXCLUSIONARY ZONING CHALLENGES AFTER *ARLINGTON HEIGHTS*

*Carol R. Cohen**

I. Introduction

While American cities are foundering in deep social and economic peril, the suburbanization of their metropolitan areas has occurred with amazing speed and consequent prosperity.[1] Each year, the metropolitan areas of the United States increase by one half million acres and, by 1978, the flight of affluent whites to the suburbs will have created suburban rings with a population fifty per cent greater than that of the cities they circumscribe.[2] Accompanying this phenomenon is the gradual shift of industry and jobs from the cities to the suburbs to meet the needs of economic growth and to escape the pressures of inner-city crime and decay.[3]

The effect of this suburbanization on minority and low income families has been the focus of recent studies. Three national commissions were formed to investigate the problem of racial and economic polarization in metropolitan areas.[4] These studies inevitably led to a consideration of suburban zoning policies, in particular, the

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[1] *See* D. Mandelker & R. Montgomery, Housing in America, Problems and Perspectives 177 (1973).

[2] President's Committee on Urban Housing, A Decent Home 137 (1969) [hereinafter cited as Kaiser Commission Report].

[3] *See* E. Bergman, introduction to Eliminating Exclusionary Zoning; Reconciling Workplace, and Residence in Suburban Areas (1974).

[4] National Commission on Urban Problems, Building the American City (1968) [hereinafter cited as Douglas Commission Report]; Report on the United States National Advisory Commission on Civil Disorders (1968) [hereinafter cited as Kerner Report]; Kaiser Commission Report, *supra* note 2.

policy of "exclusionary zoning."[5] Such zoning restrictions have been characterized as a perpetuation of residential patterns caused by decades of discrimination.[6] In fact, one report prepared for the United States Commission on Civil Rights called this economic-racial exclusion, "The racism of the seventies."[7]

The state has the authority to regulate land use through its broad discretionary powers to provide for the health, safety, and welfare of the public.[8] This authority has been almost completely delegated to local zoning boards.[9] With the power to zone comes a presumption of constitutionality and the burden is on the challenger of a zoning ordinance to prove that a contested ordinance is arbitrary or unreasonable.[10] Moreover, the courts have shown an extreme reluctance to review zoning cases at all, due to the complexities of most zoning procedures and to the administrative rather than legal character of most zoning disputes.[11] Nevertheless, with the housing shortage and unemployment reaching crisis proportions, exclusionary zoning has been frequently challenged in the courts in the last decade on the ground that it violates those rights guaranteed by the Fourteenth Amendment to the Constitution.[12]

Prior to 1974, the only Supreme Court precedent for judicial review of a zoning decision was *Village of Euclid v. Ambler Realty Co.* which was decided in 1926 on due process grounds.[13] In that case, the Court upheld the validity of the ordinances declaring that the plaintiffs had not sustained the burden of proving the absence of a

[5] *See* M. BROOKS, EXCLUSIONARY ZONING 3 (1970).

[6] *See* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING; LAND USE REGULATION AND HOUSING IN THE 1970's 10 (1973).

[7] *See* THE UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 7 (1974).

[8] This authority has been derived from the Tenth Amendment to the Constitution which provides that: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people." The Supreme Court in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), affirmed this zoning authority. "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." *Id.* at 387.

[9] *See* C. LAMB, LAND USE POLITICS AND LAW IN THE 1970's 5 (1975) (monograph).

[10] R. ANDERSON, AMERICAN LAW OF ZONING 67 n. 20 (1968).

[11] *See* R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 101-11 (1969).

[12] *See* BROOKS, *supra* note 5, at 13-27 in which are discussed Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

[13] 272 U.S. 365 (1926).

substantial relationship to the public welfare.[14] Because of the difficulties which this standard presented for those outside the community who wished to challenge a municipality's zoning ordinance, the rights afforded under the equal protection clause, amplified and clarified during the 1960's, have been invoked to attack exclusionary zoning.[15]

During the past six years, several cases have successfully challenged the constitutionality of low-income and minority exclusion.[16] The federal courts of appeals decided these cases under the equal protection standard of review developed by the Supreme Court to remedy segregation, specifically in the schools.[17] A representative case was *Village of Arlington Heights v. Metropolitan Housing Development Corp.* which was reviewed by the Supreme Court in the last term.[18] Analysis of the decision in *Arlington Heights* requires a review of the narrowing standard being applied in equal protection cases. In particular, the 1976 decision of the Supreme Court in *Washington v Davis,*[19] an employment discrimination case, reveals specific departures from previous equal protection cases. The Court in *Arlington Heights* reaffirmed the *Davis* standard requiring the showing of discriminatory purpose rather than the showing of discriminatory effect.[20] *Arlington Heights* dramatically affects the continuing efforts, organizationally and individually, to eradicate exclusionary zoning.

Following an analysis of the holding in *Arlington Heights,* this article investigates the concept of "motivation" as it relates to mounting an effective equal protection challenge to a zoning ordinance. Then the article examines the effect of the shift from the "impact" to the "motivation" standard of review on the merger of wealth and racial classifications in zoning cases. On the basis of the conclusions reached from these consideratons, the article discusses

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[14] *Id.* at 397.

[15] *Zoning—Equal Protection,* 1976 WISC. L. REV. 234.

[16] *See, e.g.*, Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1970); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

[17] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. County School Bd., 377 U.S. 218 (1964).

[18] 97 S. Ct. 555 (1977).

[19] 426 U.S. 229 (1976).

[20] 97 S. Ct. 555, 563 (1977).

the viability of the equal protection clause as a tool for attacking discriminatory zoning.

As a judicial alternative to an equal protection challenge, this article will focus on the statutory rights guaranteed by the Fair Housing Amendment to the Civil Rights Act of 1968.[21] In particular, it will be proposed that the statutory standard of review should be based on a prima facie showing of racially discriminatory effect, because Congress intended the courts to interpret the Fair Housing Act liberally in order to eradicate all forms of segregated housing. Moreover, the courts have established this prima facie case as the standard for determining discrimination in other areas of personal and societal rights protected by Civil Rights legislation.

II. Background for the *Arlington Heights* Decision

A. *Application of the "New" Equal Protection: Two Tier Standard of Review*

The era of the Warren Court was renown for the breakdown of some of the more formidable barriers to true social equality,[22] which existed for blacks and for many disadvantaged minorities.[23] Reformers used the formerly dormant equal protection clause to accomplish these advances.[24] The doctrinal framework which was developed by the Court to determine the validity of these equal protection challenges was a two tier standard of review.[25] The courts decided most cases alleging a violation of the equal protection clause under a doctrine of restrained review. This doctrine placed the burden on the challenger of a statute to show that the classification bore no reasonable relationship to a legitimate governmental purpose.[26] This

[21] 42 U.S.C. §§ 3601 *et seq.* (1973).

[22] For a broader, if somewhat superficial overview of the Warren Court years see generally J. Weaver, Warren, The Man, The Court, The Era (1967). For a more scholarly, but more circumscribed treatment, see A. Bickel, The Least Dangerous Branch 73-110 (1964).

[23] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (marriage and procreation); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel and welfare); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex).

[24] *See* Tussman & tenBrock, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

[25] *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969) [hereinafter cited as *Developments*].

[26] *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Goesart v. Cleary, 335 U.S. 464 (1948); Railway Express Agency v. New York, 336 U.S. 106 (1949).

burden was very difficult to sustain, and equal protection challenges to legislation which would be subjected to such minimum scrutiny have been virtually abandoned.[27]

The Court decided, however, that certain classifications should trigger a more active review. These classifications dealt with suspect criteria or involved a "fundamental interest."[28] Any classification based on race,[29] alienage,[30] or ancestry,[31] or infringing on rights such as the right to vote[32] or access to the criminal appeal process[33] would require strict scrutiny by the courts. Such scrutiny would shift the burden to the state to show that the legislation in question served a compelling state interest and that the involved classification was the least restrictive means available.[34] The result was that if strict scrutiny was applied and the burden of proof shifted to the state, the legislation was almost always ruled unconstitutional.[35]

It is highly unlikely that any legislation containing an explicit racial classification could meet the strict scrutiny standards.[36] However, some laws contain only de facto classifications which, though not discriminatory on their face, operatively discriminate on the basis of race or in violation of a fundamental right. These laws, too, have been subjected to strict scrutiny by the courts.[37] Since the

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[27] *See Developments*, *supra* note 25, at 1087.

[28] *See* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1650 (1971) [hereinafter cited as *Exclusionary Zoning*]; *see also Developments*, *supra* note 25, at 1087-1103.

[29] Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[30] Graham v. Richardson, 403 U.S. 365 (1971).

[31] In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

[32] Dunn v. Blumstein, 405 U.S. 330 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

[33] Griffin v. Illinois, 351 U.S. 12 (1956).

[34] *See Developments*, *supra* note 25, at 1101-02.

[35] *Id.* at 1090.

[36] The only explicit racial classification which met the burden of compelling state interest to the Supreme Court's satisfaction was Korematsu v. United States, 323 U.S. 214 (1944) which involved the internment of Japanese and Japanese-Americans during World War II. The Court held that the statute was justifiable on the basis of war-time emergency measures dealing with national security. But Justice Black, speaking for the Court, went on to say:

> It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Id. at 216.

[37] *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969)(education); Douglas v. California, 372 U.S. 353 (1963)(criminal process).

Supreme Court in *Buchanan v. Warley*[38] struck down an explicitly racially discriminatory zoning ordinance in 1917, most zoning challenges have involved those zoning regulations which, while not facially discriminatory, operate to exclude minorities.[39] The *Metropolitican Housing Development Corp. v. Village of Arlington Heights* suit was filed alleging this type of discrimination.

B. *Metropolitan Housing Development Corp. v. Village of Arlington Heights: The Opinions of the Lower Courts*

The plaintiff in *Arlington Heights* was a non-profit organization which had leased with an option to purchase a fifteen acre parcel of land in the Chicago suburb of Arlington Heights.[40] Metropolitan Housing Development Corporation (MHDC) proposed to build Lincoln Green, a 190 unit townhouse complex for low and moderate income families which would be federally subsidized under Section 236 of the National Housing Act of 1934.[41] In order to proceed, MHDC applied for a zoning change from R-3 (single-family) to R-5 (multi-family).[42] The Village Plan Commission rejected the application although MHDC made various changes in the submitted plans to attempt to satisfy some of the Plan Commission's objections.[43] MHDC then filed suit claiming that this rejection constituted racial discrimination against minority groups who worked and wished to

[38] 245 U.S. 60 (1917).

[39] *See, e.g.*, Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1970); Warth v. Selden, 422 U.S. 490 (1975).

[40] This land belongs to the Clerics of St. Viator, a Catholic religious order. It constituted the southeast corner of an eighty acre property on which is situated the order's novitiate and high school. The Clerics selected MHDC to develop the land with the proviso that subsidized low-income housing would be constructed. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975) *rev'd*, 97 S. Ct. 555 (1977).

[41] 12 U.S.C. § 1715 (Z-1) (1969). This program was designed to encourage the construction of rental and cooperative housing for lower income families. Under this program, the federal government insured mortgages and made payments to the owners to reduce their financial costs to 1%. The owner was obligated to pass on the savings to the tenants in the form of reduced rents. *See* C. EDSON & B. LANE, A PRACTICAL GUIDE TO LOW- AND MODERATE INCOME HOUSING (1972); also *Federal Low Income Rental Housing*, 2 TEX. S.U.L. REV. 64 (1972). The program was suspended in 1973. An alternative kind of financial assistance is now provided by § 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (Supp. V 1975).

[42] All of the land surrounding the fifteen acres was zoned R-3 (single family) Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 411 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977).

[43] Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977).

live in Arlington Heights.[44]

The district court refused to consider whether a racially discriminatory motive had been involved in the zoning denial. Rather, the court stated "motives are irreletive if the effect is illegal."[45] On that basis, the court found that, although the failure to rezone might have affected some blacks individually, the decision discriminated against low income people generally.[46] Since the court refused to recognize wealth as a suspect classification, or housing as a fundamental right, the zoning commission's action was not required to meet the compelling interests test.[47] The court instead accepted the defendant's evidence that the zoning change from single-family to multi-family districts would depart from the comprehensive zoning plan, which established buffer zones between industrial and residential land use.[48] The court held that this justification constituted

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[44] There was testimony that the number of jobs in the Arlington Heights area had doubled. Only 137 of the 13,000 people who worked in Arlington Heights were black, due, in part, to the unavailability of affordable housing, 517 F.2d at 414 n.2. MHDC alleged violation of the following federal statutes: Civil Rights Act of 1870, 42 U.S.C. § 1981 (1974) "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of . . . property as is enjoyed by white citizens . . . ."; the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1974) "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property."; the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1974):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . or other proceeding for redress.

and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1973) "It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States."

The district court did not consider the Fair Housing Act since no section was specifically pleaded, and the court did not think any section applicable to the facts of the case. 373 F. Supp. at 209.

[45] *Id.* at 210.

[46] *Id.*

[47] *Id.* at 209. The court stated:

> The legal issue on this point, therefore, is whether low-income minorities have a constitutional right to live in an area where they work or desire to seek work. Even more broadly, do low-income workers have a constitutional right to low-rental housing either where they work or elsewhere? We know of no such rule of law.

Id. at 211.

[48] The Village's Comprehensive Plan had been in effect since 1959 and provided that an area could be zoned R-5 (multi-family) only if it constituted a buffer zone between high and low intensity uses. The property leased by MHDC was situated in the middle of an area completely composed of single-family residences. *See* 517 F.2d at 411.

a reasonable basis for the village's refusal to rezone and ruled in favor of the defendants.[49]

MHDC appealed this decision claiming that the racially discriminatory effect of the zoning decision must be analyzed in light of the pervasive racial segregation in Chicago and its suburbs. In this context, the petitioners asserted that the refusal to rezone perpetuated racial segregation in Arlington Heights. MHDC emphasized that the community was almost completely white, and that no other plans existed for construction of integrated low income housing.[50]

The Seventh Circuit Court of Appeals reversed the lower court but disagreed with a claim by MHDC that Arlington Heights administered its zoning policy in a discriminatory manner.[51] The court agreed with the district court's ruling that proof that a certain percentage of those affected by the zoning decision were black did not constitute a sufficient racially discriminatory effect to trigger the compelling interests test.[52] The court, however, did agree that the zoning refusal perpetuated residential segregation in Arlington Heights.[53] Even though the community had not created the segregated housing pattern, it bore responsibility for the exploitation of the problem by legislative action or inaction.[54] The court stated:

> Because the Village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution toward eliminating the pervasive problem of segregated housing. We, therefore, hold that under the facts of this case Arlington Heights' rejection of the Lincoln Green proposal has racially discrimina-

[49] 373 F. Supp. at 211-212.

[50] 517 F.2d at 412. The court volunteered the statistic that the population of Arlington Heights in 1970 was 64,884 but only twenty-seven residents were black. *Id.* at 413-14.

[51] Although there were sixty zoning changes to R-5 since the inauguration of the buffer zone policy, the court found only four instances where there was a clear violation of that policy. On the other hand, there were several instances where a zoning change had been rejected on the basis of that policy. *Id.* at 412.

[52] The court based this holding on the precedent set by the Supreme Court in James v. Valtierra, 402 U.S. 137 (1971). This California case challenged the constitutionality of a provision that required state-developed low-income housing projects to be approved by referendum. The Court in *James* held that since the projects would not be wholly occupied by one racial minority, but rather by low-income persons in general, the law did not amount to impermissible racial discrimination. *Id.* at 141.

[53] 517 F.2d at 414.

[54] *Id.* at 413, *citing*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974). *See* text at note 219, *infra*.

tory effects. It could he upheld only if it were shown that a compelling public interest necessitated the decision.[55]

Since the court did not find the integrity of the comprehensive zoning plan or the prospect of deflated property values to be sufficiently compelling, the court held that the refusal to grant the zoning change violated the equal protection clause.[56]

The court of appeals decision in *Arlington Heights* was based upon a finding of discriminatory effect rather than upon a consideration of the motives behind the Plan Commission's refusal to rezone. In so holding, *Arlington Heights* conformed with other recent equal protection decisions, including several zoning cases.[57] Nevertheless, the Village appealed the decision to the Supreme Court. The grant of certiorari[58] made *Arlington Heights* one of the very few zoning cases to have ever been considered by the Supreme Court,[59] and the first zoning challenge based on racial discrimination to reach the high court since *Buchanan v. Warley* in 1917.[60]

After *Arlington Heights* was accepted for review, but before oral arguments were heard,[61] the Supreme Court decided *Washington v. Davis.*[62] This decision signalled the result which the Court reached in *Arlington Heights*. Because *Davis* reshaped the equal protection standard of review, analysis of the holding in *Davis* is necessary in order to understand the holding in *Arlington Heights*.

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[55] 517 F.2d at 415.

[56] *Id.*

[57] *See,* Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)(school desegregation); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972)(public employment); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing,* 461 F.2d 1171 (5th Cir. 1972)(municipal services); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1970)(zoning); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)(zoning). *See* text at notes 223-31, *infra.*

[58] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 423 U.S. 1030 (1975).

[59] Following Euclid v. Ambler Realty Co., 272 U.S. 365, *see* text at note 13, *supra*, the Supreme Court reviewed a zoning ordinance in Nectow v. City of Cambridge, 277 U.S. 183 (1928) and found that it bore no substantial relation to public health and safety. The next zoning case to reach the Supreme Court came almost fifty years later in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). This case challenged an exclusionary zoning provision which was upheld by the Court using the more passive reasonable basis test. A recent zoning case to reach the Supreme Court was Warth v. Selden, 422 U.S. 490 (1975). The Court never reached the substantive issues in *Warth* because it held that all of the plaintiffs lacked standing.

[60] 245 U.S. 60 (1917).

[61] Oral argument was heard on October 13, 1976. 45 U.S.L.W. 3302 (1976).

[62] 426 U.S. 229 (1976). The Court decided Washington v. Davis on June 7, 1976.

C. *Washington v. Davis: Setting a New Standard*

Washington v. Davis was a straight-forward Title VII[63] employment discrimination case. The district court[64] and the court of appeals[65] based their decisions on the Title VII standards for judging the discriminatory character of certain test requirements for jobs.[66] It was not until the *Davis* case reached the Supreme Court that the broad equal protection issues were raised[67] and its relationship to *Arlington Heights* was established.

The plaintiffs in *Davis* claimed that a test, administered to prospective District of Columbia Police Department recruits, was racially discriminatory because it excluded a high proportion of black applicants.[68] Both the district court and the appeals court accepted this fact as sufficient under Title VII standards to shift the burden to the defendant police department to prove that the test was a "business necessity" based on its reasonable relationship to job performance.[69] The district court held that the test had met this business necessity standard because it measured skills which would be required of police officers.[70] Moreover, on the basis of statistics presented by the police department, the test did not invidiously discriminate against blacks.[71] The court of appeals reversed and directed summary judgment in favor of the plaintiffs on the grounds that defendants had not shown that the test had a substantial relation to job performance. Without this showing, the discriminatory impact rendered the test invalid under Title VII.[72]

The Supreme Court reversed, explaining that the court of appeals had confused the constitutional and statutory claims and had erroneously decided the equal protection issue by the application of Title VII standards.[73] It was in the context that the Supreme Court

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[63] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Supp. IV 1974).

[64] Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972), *rev'd*, 512 F.2d 926 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

[65] Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

[66] Griggs v. Duke Power Co., 401 U.S. 424 (1971). See text at notes 214-217, *infra*.

[67] Although suit was brought under Title VII which was inapplicable to the federal government at the time the suit was filed, Title VII standards dominated the case until its appeal to the Supreme Court. *See* 426 U.S. at 236-37 n.6, 238 n.10.

[68] *Id.* at 233.

[69] 348 F. Supp. at 16; 512 F.2d at 959-60.

[70] 348 F. Supp. at 17.

[71] *Id.*

[72] 512 F.2d at 965.

[73] 426 U.S. at 238.

clarified the grounds upon which a statute or regulation, neutral on its face, can be deemed racially discriminatory in violation of the equal protection clause.[74]

The Court held that the constitutional standard for deciding cases alleging invidious racial discrimination was not the same as the statutory standards, and, since the appeal had been on constitutional grounds, the constitutional standard should have been applied.[75] The Court stated that a law or other official act would not be unconstitutional *solely* on a finding of racially discriminatory impact.[76] The Court cited a number of cases in which proof of an equal protection violation had required the showing of discriminatory legislative purpose.[77]

The Court recognized the difficulties inherent in demonstrating discriminatory motivation and enumerated a number of methods to construct such proof.[78] The Court distinguished *Palmer v. Thompson*[79] and *Wright v. Council of the City of Emporia*[80] which seemed to have warned against an inquiry into legislative motivation. The Court then criticized lower court cases which seemed to hold that proof of discriminatory motivation was unnecessary in cases alleging an equal protection violation.[81] Mr. Justice Brennan, in his dissent, disapproved of such a "laundry list,"[82] particularly since it included the court of appeals decision in *Metropolitan Housing Development Corp. v. Arlington Heights* which the Supreme Court had already accepted for review.[83] To the extent that the

[74] *Id.* at 239-40.

[75] "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Id.* at 239.

[76] *Id.*

[77] *Id.* at 239-40, *citing*, Strauder v. West Virginia, 100 U.S. 303 (1879); Akins v. Texas, 325 U.S. 398 (1945); Wright v. Rockefeller, 376 U.S. 52 (1964); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[78] 426 U.S. at 241-42.

[79] 403 U.S. 217 (1971). The Court upheld a Jackson, Miss., ordinance which had closed five city-owned swimming pools rather than operate them on a desegregated basis. The Court held that there was no discriminatory impact since the pools were now closed to everyone. The Court refused to consider motivation as the determining factor in establishing a prima facie case of racial discrimination.

[80] 407 U.S. 451 (1972). The Court held that the division of a school district had the effect of interfering with federal desegregation decrees. Whether the division was racially motivated was not considered.

[81] 426 U.S. at 244-45 n.12.

[82] *Id.* at 257-58 n.1 (Brennan, J., dissenting).

[83] 517 F.2d 409 (7th Cir. 1975).

Arlington Heights appeals court based its decision upon a finding that the challenged zoning ordinances would exert a discriminatory impact on racially segregated housing patterns in metropolitan Chicago, the *Arlington Heights* issue was settled by the Court in *Davis.*

III. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*: The Supreme Court Opinion

Before proceeding to the merits of the *Arlington Heights* case, the Court considered whether MHDC had asserted a "judicially cognizable injury"[84] which would give it standing within the constitutional limitations set forth in *Warth v. Selden.*[85] Although standing had not been an issue in either of the *Arlington Heights* lower court decisions, *Warth*, a zoning case in which none of the plaintiffs were found to have standing to present their claims of discrimination, was so factually similar that the Court reviewed the standing requirements here.[86]

Although the Court had no problem in identifying the economic injury to MHDC,[87] it did have difficulty establishing whether the corporation could assert the third party claims of racial discrimination for its prospective tenants. Rather than decide this issue, the Court recognized the rights of an individual black plaintiff who had joined with MHDC's suit on the basis that the Village's zoning refusal foreclosed his opportunity to live a reasonable distance from where he was employed.[88] Thus, the standing issue was resolved within the extremely literal interpretation of injury demanded by the *Warth* decision.[89]

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[84] Warth v. Selden, 422 U.S. 490, 514 (1975).

[85] *Id.* at 490-518.

[86] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555, 561 (1977).

[87] *Id.* at 561. The Court held that the suspension of § 236 housing projects did not preclude MHDC from procuring alternate financial assistance under the supplemental § 8 program. Thus, construction was a likelihood if the zoning impediments were removed. The Court also found that MHDC had invested a great deal of money in plans designed specifically for Lincoln Green which would be worthless if a refusal to rezone frustrated construction plans.

[88] *Id.* at 562-63. The plaintiff was employed at the Honeywell plant in Arlington Heights, but, due to the lack of low- or moderate -income housing, he lived twenty miles away in Evanston. At trial, Ransom asserted his interest in obtaining housing in the proposed Lincoln Green project.

[89] For a thorough discussion of the standing requirements in the *Warth* decision, *see Comment, Standing to Challenge Exclusionary Zoning in the Federal Courts,* 17 B.C. Ind. & Comm. L. Rev. 347 (1976).

Turning to the consideration of the merits of the case, Mr. Justice Powell, writing the opinion for a five-man majority,[90] immediately reiterated the *Washington v. Davis* standard of review for an equal protection claim of racial discrimination. Although disproportionate impact may be used as a factor to determine intent, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[91] The discriminatory purpose does not have to be the sole motivating factor in a legislative or administrative determination.[92] However, the Court did not allow proof of a discriminatory secondary purpose, standing alone to trigger the compelling interest test. In a footnote at the end of the opinion, almost as an afterthought, the Court held that when such a purpose is shown, the burden shifts to the decision-making body to establish that the same result would have been reached absent the impermissible purpose.[93]

In an attempt to clarify the means by which discriminatory intent can be established, the Court suggested some specific criteria which could be considered. The discriminatory administration of a statute or regluation would render it unconstitutional, as the Court held in *Yick Wo v. Hopkins.*[94] One or all of the following factors could be determinative of a racially discriminatory intent: the historical background of a decision which might reveal a pattern of discrimination; or a sequential consideration in which a sudden shift from the norm might demonstrate a discriminatory purpose; or an investigation into the legislative or administrative history surrounding the decision-making.[95] Motivational analysis is not exhausted by these considerations, but the Court found them sufficient to decide whether discriminatory intent had been a factor in the Village's refusal to rezone in *Arlington Heights.*

The Court noted that both of the lower courts in *Arlington Heights* had considered and rejected a finding of discriminatory motives in the Village's decison.[96] In addition, the Court applied its

[90] Joining Mr. Justice Powell in the majority opinion were Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Blackmun and Mr. Justice Rhenquist. 97 S. Ct. 555 (1977).

[91] *Id.* at 563.

[92] The Court acknowledged the difficulty in ascertainment of a primary motive of a legislative or administrative body. *Id.* at 4077 n.11, *citing* McGinnis v. Royster, 410 U.S. 263 (1973), to support the decision that the discriminatory purpose need not be dominant.

[93] 97 S. Ct. at 566 n.21.

[94] 118 U.S. 356 (1886).

[95] 97 S. Ct. at 564-65.

[96] *Id.* at 565.

own criteria to the evidence. There was no break in the ordinary sequence leading to the Village's zoning decision which might have indicated a suspect motivation. There was nothing in the official reports of the hearings of the Plan Commission that would prove intentional racial discrimination in the resultant decision. Finally, there was no inconsistency in the administration of the buffer zone policy indicating a discriminatory purpose in the zoning denial for Lincoln Green.[97] Finding that MHDC had not proven a discriminatory motive behind the Village's decision, the Court held that the zoning denial had not violated the equal protection clause. Since the statutory claim of discrimination in violation of the Fair Housing Act had not been considered by the court of appeals, the Supreme Court remanded the case for consideration under this standard.[98]

Mr. Justice Marshall and Mr. Justice Brennan, while concurring with the standing analysis of the restatement of the *Davis* standard of review, disagreed with the majority's application of this new equal protection test to the facts of this case. These Justices considered the court of appeals a better forum for such an application and stated that the case should have been remanded for a determination of the constitutional as well as statutory issue.[99]

Mr. Justice White dissented from the majority opinion in its entirety on procedural rather than substantive grounds. Since the *Washington v. Davis* opinion was rendered following the court of appeals decision in *Arlington Heights,*[100] he would have had the Supreme Court vacate the appeals court judgment and remand the case for consideration in light of the new constitutional standard set forth in *Davis.* White stated that it was not necessary to refine this standard through repetition and development, and he noted that the usual Supreme Court practice is to remand in the event of an intervening decision.[101]

In the immediate future, the *Arlington Heights* decision will exert a profound impact on challenges to exclusionary zoning in the courts. To determine whether the equal protection clause can still be used as an effective vehicle for such a challenge or whether the

[97] *Id.* at 565-66.

[98] *Id.* at 566.

[99] *Id.* at 566-67.

[100] The *Arlington Heights* Court of Appeals decision was announced on June 10, 1975 and *Washington v. Davis* was decided a year later, on June 7, 1976.

[101] 97 S. Ct. 555, 567 (White, J., dissenting).

Arlington Heights and *Davis* standard demanding proof of discriminatory motivation will be insurmountable in most zoning cases, an investigation into motivational analysis beyond that considered by the Supreme Court must be undertaken.

IV. Motivation: An Analysis

A. *Motive or Purpose: A Definitional Problem*

The Court in *Washington v. Davis* and *Arlington Heights* used the words "purpose" and "motive" interchangeably.[102] This usage is not unusual for the Supreme Court; the Court has never made a definitional distinction between the two terms, and has used one when meaning the other in a number of cases.[103] Many commentators and lower courts consider the distinction an important one which has become crucial in an investigation of what is now required to allege discrimination in a zoning decision. The main difference between "purpose" and "motive" is that purpose signifies what one means to do; motive connotes why one means to do it. In terms of proof, purpose is objectively ascertainable, while motive must necessarily be subjectively analyzed. To determine legislative purpose, a court may look at the terms of a statute, its operation, and its effect. Motivation, on the other hand, involves an analysis of the considerations which led the legislators to vote as they did.[104] Professor Ely, in an article on legislative motivation, defines the distinction more caustically: "By and large, the term 'purpose' has served as nothing more useful than a signal that the court is willing to look at motivation, 'motive' as a signal that it is not."[105]

The reason for Professor Ely's belief that the question is whether or not the court will consider motivation is that, unless a particular statute can be traced to a single legislative objective, discriminatory purpose will be very difficult to prove without reference to an impermissible motive. One case which was resolved on the basis of racially discriminatory purpose without consideration of legislative motivation was *Gomillion v. Lightfoot*, the famous Tuskegee gerrymander

[102] Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S. Ct. 555 (1977). In distinguishing *Palmer v. Thompson*, the *Davis* Court uses the two words in the same sentence, as "purpose or motivation." 426 U.S. at 243.

[103] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383-86 (1968).

[104] *See, Developments*, *supra* note 25, at 1091-94.

[105] Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1217 (1970).

case in 1960.[106] In *Gomillion,* Justice Frankfurter applied objective criteria and found that the sole purpose of the legislation was an unconstitutional denial of the right to vote.[107] But *Gomillion* is the exception that proves Professor Ely's rule.[108] The search for legislative motive is rarely satisfied by external evidence and the Supreme Court recognized this in *Arlington Heights.* "Absent a pattern as stark as that in *Gomillion* . . . , impact alone is not determinative, and the Court must look to other evidence."[109] Particularly in the field of zoning, the ability to isolate one certain legislative purpose without reference to motivation would be practically impossible. For this reason, this article will consider the problems inherent in judicial review of legislative motivation on the assumption that the *Arlington Heights* standard requires a finding of discriminatory motive, not discriminatory purpose.

B. *Problems in Ascertainment of Motivation*

Justice Cardozo once stated, "There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."[110] The Supreme Court has reiterated this philosophy in cases spanning the years from 1810[111] to 1971.[112] Now, at least in terms of racial discrimination and the equal protection clause, legislative motivation has become a proper subject for judicial inquiry. The reason for this ambivalence is that determination of motivation, especially in a charge of racial discrimination, is difficult and unreliable. Legislative motives are almost always complex and are very often unexpressed. The Court in both *Davis*[113] and *Arlington Heights*[114] attempted to minimize the difficulties with specific examples of methods to determine motivation. But there is no satisfactory formula which can be applied in

[106] 364 U.S. 339 (1960).

[107] *Id.* at 341.

[108] For an interesting discussion of the ascertainment of "purpose" in *Gomillion* and where it stands as precedent, *see* BICKEL, *supra* note 22, at 210-12.

[109] 97 S. Ct. at 564.

[110] United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting).

[111] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Justice Marshall held that the question of intent could not be raised concerning possible political corruption in a land grant made by the Georgia legislature. This was a pure case of subjective legislative motivation, not concerned with establishing whether the purpose of the act was constitutional.

[112] Palmer v. Thompson, 403 U.S. 217 (1971); see note 80, *supra*.

[113] 426 U.S. at 241-43.

[114] 97 S. Ct. at 564-65.

all instances. An examination of the methods which the Court suggests demonstrates that they may often be problematical and inexpedient.

The *Arlington Heights* Court recognized that one clear way to establish the motivation of those who passed the allegedly discriminatory rule is to examine the statements made by the legislators, or by their constituents, prior to the rule's enactment. The Court also took notice of one objection to judicial review of motivation: it intrudes improperly into the separate but equal legislative branch.[115] There is no satisfactory solution offered by the Court to the constitutional roadblock of the separation of powers and, in fact, the district court did not allow MHDC to question the Village Board members concerning their motivations when they voted to refuse the zoning change.[116]

Beyond the constitutional problem,[117] there exist other substantive and procedural difficulties. The only possibility of determining legislative motivation would be to cross examine each legislator concerning his vote, a process untenable in representative government. The people whom the legislator represents are entitled to an explanation of his vote, based on the fact that his vote is their vote. Any accountability beyond that relationship violates the representative function of the legislator. Expediency is also significant; if the legislators were forced to state their reasons to the court for every controversial vote, very little legislation would be enacted.[118] In addition, a complication arises in the determination of how many legislators must have a discriminatory motive to render the act impermissible. The courts have generally resolved this problem on an *ad hoc* basis, relying on the general rule that, if a majority of legislators express a discriminatory motive, the act is unconstitutional.[119]

The impropriety which an inquiry into legislative motivation implies is not present in a similar inquiry into administrative motives. The *Davis* Court approved a finding of a racially discrimina-

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[115] The Court also offered this contradictory statement; "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id.* at 565.

[116] *Id.* at 566 n.20.

[117] For an indepth analysis of this issue, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95.

[118] *See* BICKEL, *supra* note 22, at 215.

[119] Ely, *supra* note 105, at 1219-20.

tory purpose through an examination of the administration of a rule.[120] This analysis avoids the problem of intrusion into a coordinate branch of the government, and the whole discovery process also becomes much simpler.[121] In an administrative body, the court is dealing with a more manageable number of people who are specifically concerned with the implementation of the allegedly discriminatory rule. Also, the court may more easily infer a discriminatory purpose of an administrative body from a discriminatory effect, as it did in *Yick Wo v. Hopkins*.[122] A law may have been enacted based upon many different motives and it may produce more than one effect. The administration of the law, however, is more straightforward; the administrator is attempting to implement the purpose of the rule by producing the desired effect. As Professor Bickel succinctly phrased it, when the court deals with motive at the legislative level, it is dealing with it "wholesale;" at the administrative level, it is "retail."[123] Because a determination of legislative motivation involves these substantive and procedural problems, motivation inquiry arguably should be confined to administrative officials.

Assuming that the officials do not publicly commit themselves to a racially discriminatory motive, the Court suggests other, less tangible, ways of determining motivation.[124] If the law or ordinance departs from traditional procedures established by the governing body, a suspect motivation could be assumed. The existence of decisions in other areas of government which would fit the challenged rule into a mosaic of discriminatory conduct would probably be sufficient to establish a proscribed motive. Also, the sequence of events should be taken into account. If a requested zoning change immediately precedes a city's adoption of a Master Land Use Plan which designates the use of the land in question as a park, the discriminatory motives behind the zoning change denial may be inferrable from this sequence of events.[125] All of these factors are circumstantial. In criminal law, such evidence would be enough to

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[120] 426 U.S. 229 (1976). Both the *Davis* and *Arlington Heights* Courts discussed, as dicta, appropriate methods of establishing racially discriminatory motive or, in the rare case, purpose. Both Courts mention *Yick Wo v. Hopkins* as an example of the ability to discern discriminatory purpose from the administration of a statute. *Id.* at 241 and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S.Ct. at 564.

[122] 118 U.S. 356 (1886).

[123] BICKEL, *supra* note 22, at 217.

[124] 97 S. Ct. at 564-65. *See also* Brest, *supra* note 117, at 119-24.

[125] United Farmworkers v. Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 807 (5th Cir. 1974).

determine intent.[126] In dealing with the acts of governmental bodies, however, which are presumed to be constitutional, basing motivation upon such criteria is somewhat more problematical.

An examination of the Court's methods of motivational research reveals that any complaintant alleging an equal protection violation must sustain a difficult burden of proof. Beyond this threshold difficulty, an exclusionary zoning challenge faces special circumstances in addition to those found in other equal protection challenges. A consideration of these facts in light of the basic problems in ascertainment of motivation will determine whether the *Arlington Heights* case has effectively foreclosed the use of the equal protection clause in attempts to eradicate discriminatory zoning.

C. *Motivational Analysis in Zoning Cases*

There are two overlapping aspects of a zoning decision which operate to frustrate a motivational analysis: the private nature of the proceedings and the temptation of zoning officials to structure their policies to conceal impermissible motives. Zoning decisions are most often made behind closed doors with no published, or readily obtainable, report of the meeting.[127] These decisions are often preceded by open hearings in which those who would be affected by the decisions are invited to speak. A public hearing was held prior to the zoning decision in the *Arlington Heights* case, and some members of that community spoke in opposition to opening the community to low income and minority people.[128] In the search for legislative motivation, the difficulty lies in attributing the motives of the community to the decision-making body. There are instances, however, when just such a showing can be made. In *Dailey v. City of Lawton*,[129] the Tenth Circuit Court of Appeals upheld the district court's finding of racial discrimination in a failure to grant a zoning change. The denial was based upon a petition which had been circulated in opposition to the change. The court stated, "In our opinion, it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individu-

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[126] *See* BICKEL, *supra* note 22, at 214.

[127] *See* BABCOCK & BOSSELMAN, *supra* note 6.

[128] 97 S. Ct. at 559. The Court stated, "Some of the comments, both from opponents and supporters, addressed what was referred to as the 'social issue' — the desirability or undesirability of introducing at this location in Arlington Heights low and moderate income housing, housing that would probably be racially integrated." *Id.*

[129] 425 F.2d 1037 (10th Cir. 1970).

als."[130] Zoning ordinances which are subjected to a public referendum can provide the court with possible evidence of electorate objectives upon which the court can base a finding of discriminatory motivation.[131] This would depend on whether the wording of the referendum was explicit enough to determine the significance of a positive or negative note. In general, however, such empirical evidence linking the will of the majority with the actions of the zoning officials is not available, and the private, self-contained nature of a zoning board decision will frustrate motivational investigation.

In *Palmer v. Thompson*,[132] Mr. Justice Black pointed out the difficulties of ascertaining motivation. Then he stated a further difficulty adding to the investigatory problem:

> Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably by valid as soon as the legislature or relevant governing body repassed it for different reasons.[133]

It can be argued that futility is not the proper characterization for the very real problem he describes. A satisfactory solution exists in the event of a careful redrafting of a rule previously found unconstitutional on the basis of a discriminatory motive. The court could enjoin a legislature or relevant governing body from repassing the same rule unless the decision-makers present persuasive evidence that circumstances have changed or that the passage of time or personnel has signaled a change in attitude.[134] But investigators of legislative or administrative motivation, particularly those concerned with zoning decisions made behind closed doors, are faced

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[130] *Id.* at 1039.

[131] *See* James v. Valtierra, 402 U.S. 137 (1971)(each low income housing project to be approved by referendum); Reitman v. Mulkey, 387 U.S. 369 (1967)(Proposition no. 14 on the California ballot giving individuals the right to discriminate in the sale of privately-owned real estate). *Contra*, Southern Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291 (9th Cir. 1970) in which there was a city-wide referendum. The court held:

> If the voters' purpose is to be found here, then it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise.

Id. at 295.

[132] Palmer v. Thompson, 403 U.S. 217 (1971).

[133] *Id.* at 225.

[134] *See* Brest, *supra* note 117, at 126-27.

with a more insoluble dilemma. A standard of review based on motivation encourages a careful structuring of statements and conduct concerning avowed motives on the part of the officials engaged in discriminatory conduct. Dishonesty of officials may become a byproduct of motivational analysis which could prevent any showing of discriminatory intent by challengers of a zoning ordinance.[135]

There are two considerations, however, which may affect the possibility of successfully determining motive in a zoning decision. First, the question may be raised whether a local zoning board is a legislative or administrative body.[136] In the case of municipal governments, the distinction narrows due to the overlapping functions of some municipal authorities. Whether a zoning board should be considered "legislative" or "administrative" should depend on whether it is considered representative; that is, whether the board member is seen to represent a constituency whose wishes he attempts to define and implement.[137] An argument can certainly be made that a zoning official is not called upon to account to voters for his decisions.[138] This fact would place the local zoning board on the administrative side of the fence which would facilitate the judicial review of motivation behind a zoning ordinance. Zoning board members could be cross-examined and official minutes of meetings could be scrutinized[139] without the traditional deference which courts have granted to legislatures. Courts have used this process with school boards in efforts to determine the existence of de jure school segregation.[140] It can be equally as effective in the area of zoning.

Secondly, zoning may be uniquely suited to motivational analysis because it offers the opportunity to investigate beyond the challenged decision to the larger rule which mandated it. Zoning ordinances are almost always rule-generated decisions.[141] Most cities and towns have formulated master plans for land use.[142] Conse-

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[135] *See* BICKEL, *supra* note 22, at 215.

[136] *See Developments, supra* note 25, at 1097-98. The note discusses the difference between legislative and administrative agencies, not zoning boards in particular.

[137] *See* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 15.00-02 (1976).

[138] *See* ANDERSON, *supra* note 10, at § 3.01-08.

[139] The *Arlington Heights* Court was willing to do the latter, but not the former. 97 S. Ct. 555, 566 n.20.

[140] *See* Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

[141] *See* ANDERSON, *supra* note 10, at § § 1.12-15.

[142] *See* BABCOCK, *supra* note 11, at 62-86.

quently, when a zoning decision is made without reference to an existing plan it almost requires judicial inquiry into motivation. The plan behind the zoning decision is open to judicial review and, as Mr. Justice Frankfurter suggested in *United States v. Kahriger*,[143] the merits of the rule may constitute evidence of motivation.[144] Of course, this analysis can work against the plaintiff in a zoning challenge, as it did in the district court decision in *Arlington Heights*. That court found that Arlington Heights' comprehensive zoning plan was consistent with the stated objectives of the Village Board of Trustees.[145] There are plans, however, in which an impermissible motive can be divined, such as the one adopted by the city of Delray Beach, Florida, which was in direct opposition to the recommendations of its own planning expert and which was substituted for one which would have permitted a proposed housing project to tie into municipal services.[146]

Although these last two considerations can be seen as a glimmer of hope for exclusionary zoning challenges faced with proof of a discriminatory motive, they are only possible aspects of a zoning decision which the courts might consider. On balance, the change in standard of review from "effect or impact" to "purpose or motive" will present great difficulties in mounting an effective equal protection challenge to a zoning ordinance. In those specific fact situations in which objective criteria may determine intent, the difficulties may not be insurmountable, as the Supreme Court in *Arlington Heights* suggested.[147] But, given the usual case of an outside developer desiring to build low income and minority housing who contests a multi-purpose zoning decision, proof of discriminatory motivation may be impossible.

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[143] 345 U.S. 22 (1953).

[144] *Id.* at 39 (Frankfurter, J., dissenting).

[145] *See* text at note 49, *supra*.

[146] United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

[147] 97 S. Ct. 555 (1977). The Court gave as a possible example Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1970), which, although decided on the basis of discriminatory impact, demonstrated enough objective criteria (such as a moratorium on new housing subdivisions and a zoning change to an open space area after plans for a low-income housing project became known) to infer discriminatory motivation. 97 S. Ct. at 564 n.16.

D. *The Effect of a Motivation Standard of Review on the Relationship between Racial and Economic Discrimination*

Exclusionary zoning has primarily been directed against racial and ethnic minorities and the poor.[148] Part of this can simply be attributed to prejudice, but there are economic reasons for a municipality to discourage the construction of low-cost housing for the poor. Low income families increase the demand upon municipal services while contributing less tax revenue than wealthier citizens.[149] Therefore, public opposition to low rent housing projects has been reflected in the negative decisions of local zoning boards. Those wishing to challenge the decisions based upon equal protection violations have had to cope with the established two tier system of judicial review.[150]

In order to have the burden shifted to the defendants to show a compelling state interest for the zoning decision, wealth must be regarded by the courts as a suspect classification, a possibility rejected by the Supreme Court decision in *San Antonio School District v. Rodriguez*.[151] Thus, a law may discriminate on the basis of wealth alone as long as it bears a rational relationship to a legitimate state purpose and does not abridge any fundamental right. An argument can be made, as Mr. Justice Marshall states in his dissent in *James v. Valtierra*,[152] that the wealth classification should at least be considered quasi-suspect.[153] Some case precedent indicates that the Supreme Court, while not shifting the burden, is prepared to examine, somewhat more carefully, classifications based on wealth.[154]

Since wealth alone is not a suspect criterion, some exclusionary zoning challenges have been based on a combination of economic discrimination and the violation of a fundamental right. The Supreme Court held in *Lindsey v. Normet*,[155] that there was no consti-

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[148] *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 1-13 (1975).

[149] *See Exclusionary Zoning, supra* note 28, at 1667.

[150] *See* text at notes 22-39, *supra*.

[151] 411 U.S. 1 (1973).

[152] 402 U.S. 137 (1971).

[153] *Id.* at 144-45 (Marshall, J., dissenting).

[154] *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

[155] 405 U.S. 56 (1972). The Court stated, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." *Id.* at 74.

tutional right to housing, and, in *Village of Belle Terre v. Boraas*,[156] that there was no fundamental right to land use. Therefore, some of those wishing to challenge the decision of a zoning board to exclude low income housing have relied on the fundamental right to travel which was recognized in *Shapiro v. Thompson*.[157] This led to a great deal of controversy[158] but absolutely no success.[159]

While these zoning challenges were failing, the Supreme Court seemed to be moving toward a discriminatory impact standard of review in racial segregation cases.[160] Those dedicated to combating exclusionary zoning emphasized the statistical correlation between being black and being poor. Many zoning decisions which prevented the construction of low income housing affected a disproportionately large number of blacks.[161] As a consequence, the zoning cases decided by the courts since 1970 have constituted a merger between economic and racial classifications in order to trigger the strict scrutiny test for equal protection.[162]

This merger has come under increasing attack by the Supreme Court. In *James v. Valtierra*,[163] the Court held that a law, neutral on its face, which would have a greater impact on a racial minority, but which disadvantaged a larger group of low income families, could not be held subject to rigid scrutiny. The *Arlington Heights* lower court decisions distinguished the *James v. Valtierra* holding.[164] The Seventh Circuit found racial discrimination in low income exclusionary zoning by applying another test formulated by the Second Circuit in *Kennedy Park Homes Ass'n v. City of Lackawanna*,

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[156] 416 U.S. 1 (1974). The plaintiffs in this case included the owners of the house which was rented in violation of a zoning ordinance. The Court held that municipal restriction of land use was not unconstitutional. *Id.* at 7.

[157] 394 U.S. 618 (1969).

[158] *See The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975); *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* 39 U. CHI. L. REV. 612 (1972); *Judicial Responses to Comprehensively Planned No-Growth Provisions; Ramapo, Petaluma and Beyond*, 4 ENV. AFF. 759 (1975).

[159] *See* Village of Belle Terre v. Boraas, discussed at note 156, *supra* and Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3473 (1976).

[160] *See* Palmer v. Thompson, 403 U.S. 217 (1971); and Wright v. Council of Emporia, 407 U.S. 451 (1972).

[161] *See, e.g.*, Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971).

[162] See text at note 39, *supra*.

[163] 402 U.S. 137 (1971).

[164] Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975), *rev'd*, 97 S. Ct. 555 (1977).

N.Y.[165] The Second Circuit not only looked at the zoning decision "in its immediate objective but its historical context and ultimate effect."[166] This test allowed the *Arlington Heights* appeals court to formulate its exploitation theory of racial discrimination.[167] Nevertheless, the *Valtierra* decision made it difficult to prove that a statute or ordinance based on, or affecting primarily a wealth classification was racially discriminatory.

The Supreme Court erected another roadblock to impede a challenge correlating racial and economic discrimination in *Warth v. Selden.*[168] The Court denied standing to four plaintiffs who sought to challenge a zoning ordinance on the basis of its exclusion of low income people, and, coincidentally, minority people. The Court held that there was no proof that the specific plaintiffs had been the victims of racial discrimination, despite objective data showing the exclusionary effects which the town's zoning policies had had on minorities. The question of standing was decided solely on the issue of wealth discrimination.[169] Without reaching the merits, the Court in *Warth* made clear its unwillingness to imply racial discrimination from wealth discrimination.

These serious setbacks to the merger of economic and racial classifications established the context for the challenge to the zoning denial in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[170] The Court in this case sidestepped the correlation between race and wealth by granting standing to a black plaintiff who claimed an injury as a result of an allegedly racially discriminatory zoning decision. It did not decide whether racial discrimination could be implied from the MHDC's injury; that is, the foreclosure of the opportunity to build low income housing in Arlington Heights.[171] If racial discrimination cannot be inferred from its statistical correlation to economic discrimination, and motivational analysis is applied, zoning officials can explicitly state that opposition to low income housing was a motivating factor in their zoning decisions without triggering the application of strict scrutiny. Since zoning ordinances not subject to active review are presumed ra-

[165] 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1970).
[166] 436 F.2d at 112.
[167] *See Zoning-Equal Protection, supra* note 15, at 250-52.
[168] 422 U.S. 490 (1975).
[169] *Id.* at 502.
[170] 97 S. Ct. 555 (1977).
[171] *Id.* at 562.

tional, the future of challenges to zoning decisions which operate to exclude low income housing is fraught with difficulty. In fact, with *James v. Valtierra*,[172] *Warth v. Selden*,[173] and *Arlington Heights*,[174] the pendulum of the Supreme Court seems to have swung in the opposite direction from the expansive equal protection decisions of the 1960's. In that decade, the natural expectation of constitutional authorities was that the Supreme Court, which had emphasized equal opportunity in voting rights, criminal justice, and education,[175] would extend that opportunity into the area of housing so that no citizen, black or poor, would be denied the possibility of a decent home.[176] In the wake of the housing and zoning decisions of the seventies, the priority which the Supreme Court places on those ideals is doubtful.

V. Judicial Alternative to Equal Protection Challenges: Fair Housing Act of 1968

A. *Background*

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968,[177] is a broad comprehensive federal statute enacted to eliminate discrimination in the sale or rental of housing, through private and public enforcement powers.[178] The constitutionality of this statute has been based on section five of the Fourteenth Amendment which gives Congress power to protect the rights guaranteed by the amendment through appropriate legislation,[179] and on the Thirteenth Amendment which demands the elimination of the "badges and incidents" of slavery in the United States.[180] Zoning is included in

[172] 402 U.S. 137. See text at notes 164-65, *supra*.

[173] 422 U.S. 490 (1975). See text at notes 169-70, *supra*.

[174] 97 S. Ct. 555 (1977).

[175] Reynolds v. Sims, 377 U.S. 533 (1964) (voting); Douglas v. California, 372 U.S. 353 (1963) (criminal process); Griffin v. County School Bd., 377 U.S. 218 (1964).

[176] Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 Stan. L. Rev. 767, 790 (1969).

[177] 42 U.S.C. §§ 3601 *et seq.* (Supp. III 1973).

[178] In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968), the Supreme Court described the Fair Housing Act as a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."

[179] U.S. Const. amend. XIV, § 5. In the Congressional debates prior to the bill's enactment it was this section upon which the constitutionality of the fair housing amendment was based. *See* 114 Cong. Rec. 2273-75, 2698-2703, 9561-64 (1968).

[180] As interpreted in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *See* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973) in which the court relied upon the reasoning of the Supreme Court in *Jones* which based the constitutionality of another civil rights statute, 42 U.S.C. § 1982 (1970), upon the authority of Congress to enforce the Thirteenth Amendment. *Id.* at 120.

the Fair Housing Act under § 3604[181] which proscribes discrimination in the sale or rental of a dwelling. As defined in § 3602,[182] a dwelling can include any vacant land which is for sale or rent. Any governmental agency which is concerned with housing, or with land which is to be used for housing, is required to follow a policy of colorblindness.[183]

The *Washington v. Davis* Court specifically differentiated statutory from constitutional standards in racial discrimination cases.[184] The *Arlington Heights* case reinforced this holding by implication when the Court decided the constitutional issue but remanded the statutory issue under the Fair Housing Act.[185] The contention that the statutory standard is different from the constitutional standard for determining claims of racial discrimination is buttressed by the concurring opinion in *Trafficante v. Metropolitan Life Insurance Company*[186] which is the only Fair Housing case to reach the Supreme Court since the statute's enactment. This case involved an appeal from a denial of standing to tenants, one black and one white, who were protesting their landlord's perpetuation of a segregated housing situation. The concurring opinion by Mr. Justice White emphasized that the statutory basis for the standing to sue was much broader than the constitutional one and that absent the statute, the plaintiffs could not have maintained their suit.[187]

[181] Fair Housing Act, 42 U.S.C. § 3604 (Supp. III 1973). This section reads in part: "It shall be unlawful: [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin."

[182] Fair Housing Act, 42 U.S.C. § 3602 (Supp. III 1973).

As used in this subchapter:

> (b) "Dwelling" means any building, structure, or portion thereof which is occupied as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof.

[183] *See* Otero v. New York City Housing Auth., 354 F. Supp. 941 (S.D.N.Y. 1973) and Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

[184] See note 75, *supra*. *But see* General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (1976) in which Mr. Justice Rehnquist, writing for the majority of the Court, seemed to indicate that the constitutional standards for determining discrimination could be a starting point for determining the statutory standards. This is not completely clear since there is later language indicating that proof of discriminatory effect can be the standard for a prima facie Title VII violation. Nevertheless, Mr. Justice Blackmun, concurring, and Mr. Justice Brennan, dissenting, objected to any inference that the Title VII standard of discriminatory effect was altered by the constitutional standard requiring proof of discriminatory motive. *Id.* at 4037.

[185] 97 S. Ct. at 566 (1977).

[186] 409 U.S. 205 (1972).

[187] *Id.* at 212 (White, J., concurring).

If the statutory standard for proving discrimination in the sale or rental of housing is not the same as the constitutional standard, questions arise as to the degree of difference, and burden of proof which must be sustained by the plaintiff in a Title VIII discriminatory zoning challenge. Absent clear statutory language concerning the necessary standard, and without Supreme Court precedent in this matter, the statutory standard of review remains uncertain.[188] Most courts have interpreted the *Trafficante* decision as indicating that the standard should be liberally formulated to effectuate the purpose of the Act, the eradication of discrimination in housing.[189] Some courts have specifically stated that the standard should be that a prima facie showing of discriminatory effect would shift the burden to the defendant who would have to prove that the discriminatory action was necessary.[190] If this statutory standard is adopted on a wide scale, it could be relied upon by those wishing to allege discrimination in exclusionary zoning as an alternative to the narrowing standard of review under the equal protection clause.[190.1]

B. *Arguments for the Establishment of Discriminatory Effect as the Prima Facie Case for Title VIII Cases*

1. Tests for a Prima Facie Showing of Discriminatory Effect

In recent years, the Eighth Circuit Court of Appeals has set the clearest definition of what constitutes a prima facie case of discrimination in Title VIII cases. That court, in *United States v. City of Black Jack,*[191] stated that "the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect."[192] The adverbs "actually" or "predictably" described two distinct tests previously advanced in *Williams v. Mathews Co.*[193] for determining discriminatory effect. The "actual" test meant that the plaintiff demonstrated real evidence of individual discrimination by

[188] *Compare* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) *with* Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975).

[189] *See, e.g.*, United States v. Henshaw Bros., 401 F. Supp. 399, 402 (E.D. Va. 1974); Joseph Skillken & C. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974), *rev'd*, 528 F.2d 867 (6th Cir. 1975).

[190] *See* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974).

[190.1] Shortly before printing, the Seventh Circuit Court of Appeals conditionally approved this standard on remand. See note 248, *infra*.

[191] 508 F.2d 1179 (8th Cir. 1974).

[192] *Id.* at 1184.

[193] 499 F.2d 819, 826-28 (8th Cir. 1974).

the defendant. In the *Williams* case, it meant that a potential purchaser of land from a real estate developer had met all of the objective criteria and the sale would have been made if he had not been black.[194] The "predictable" test meant that statistical evidence indicated that the defendants' acts would continue and/or exacerbate a pattern of discrimination. In the *Williams* case, the developer sold lots only to those who contracted with "approved" builders who, in the past, had only accepted white clients.[195] Many courts have relied upon statistical evidence to demonstrate discriminatory effect while recognizing that proof based solely on statistics is open to challenge.[196] The pool from which the statistics are drawn and the figure chosen for comparison can determine the result.[197] For this reason, courts have generally based a prima facie case of racial discrimination in housing on a combination of actual and statistical evidence.[198]

The Courts of Appeals in *Arlington Heights*[199] and *Kennedy Park Homes Association v. City of Lackawanna*[200] formulated a third test, beyond the "actual" or "predictable" tests described in *Williams.* This test relied upon the historical context and the ultimate effects of the defendant's action.[201] Although this test has not clearly been applied to establish a prima facie showing of discrimination under Title VIII, it may be so formulated and applied when the court of appeals hears the *Arlington Heights* case on remand.

2. Legislative History

One method to determine whether the prima facie standard of discriminatory effect should be adopted by the courts in Title VIII actions is to examine the legislative history of the Act to determine congressional intent. The Fair Housing Act was passed as a Senate

[194] *Id.* at 826.

[195] *Id.*

[196] *Compare* United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973) *with* United States v. Real Estate Dev. Corp. 347 F. Supp. 776 (N.D. Miss. 1972). *See also* Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases,* 34 MD. L. REV. 59 (1974).

[197] *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation,* 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 705 (1976).

[198] *See* Comment, *Curbing Exploitation in Segregated Housing Markets: Clark v. Universal Builders, Inc.*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 705 (1975).

[199] Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975), *rev'd,* 97 S. Ct. 555 (1977).

[200] 436 F.2d 108, 112 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

[201] 517 F.2d at 414.

amendment to a Civil Rights bill which had originated in the House.[202] Therefore, there are no committee reports, and the legislative history must be gleaned from floor debates in the House and the Senate.[203] A study of the debates evinces a congressional intent to use the Fair Housing Act as a means of alleviating years of de facto segregation.[204] Congressmen noted that twenty-two states and eighty-four cities and towns already had adopted some form of fair housing legislation by 1967.[205] These laws had not eliminated discrimination in housing, however, and broad federal legislation was needed.[206] The Senate resisted any attempts to limit the Act by the requirement of proof of racial preference in the sale of a home through a real estate agent.[207] In fact, the Dirksen compromise, which was finally adopted, only slightly limited the coverage originally proposed by the more liberal factions in the House[208] and actually broadened the enforcement powers of the Attorney General.[209] Therefore, the conclusion can be drawn that the purpose of the Fair Housing Act was to remedy the effects of racial discrimination as it exists in the United States housing market, and that a prima facie showing of a discriminatory effect should be sufficient to shift the burden to the defendant to justify his action. To adopt a narrower

[202] Title VIII was an amendment to H.R. 2516 which was an election year, House-passed civil rights workers' protection bill. See Dubofsky, *Fair Housing: A Legislative History and A Perspective*, 8 WASHBURN L.J. 149 (1969).

[203] An examination of the confluence of events outside and inside Congress during the period of the debates may be helpful to an understanding of the atmosphere in which the amendment was passed: February 1968—Debate on floor of Senate; March 1, 1968—Kerner Commission Report, *supra* note 4 (dealing with urban problems including segregation) was released; March 11, 1968—Bill passed Senate and sent back to House with amendments; April 4, 1968—Martin Luther King assassinated; April 10, 1968 — House agreed to Senate amendments; April 11, 1968 — President Johnson signed bill. *See* Dubofsky, *supra* note 202.

[204] A representative statement was made by Senator Edward Brooke (R.-Mass.) on February 6, 1968:

> Fair Housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America. It will make possible renewed hope for ghetto residents who have begun to believe that escape from their demeaning circumstances is impossible. 114 CONG. REC. 2279 (1968).

[205] *Id.* at 3421.

[206] *See, e.g., id.* at 2277 (remarks by Sen. Mondale).

[207] *Id.* at 5221-22 (rejection of Sen. Baker's proposed amendment).

[208] The amendment was originally proposed by Senator Mondale. *See* Dubonsky, *supra* note 202.

[209] *See* Dubofsky, *supra* note 202, at 156-57.

standard would be to undermine the congressional intent "to remove the walls of discrimination which enclose minority groups in ghettos."[210]

3. Statutory Construction

Another argument for a statutory standard of review based on discriminatory effect for individual plaintiffs is that such a standard is written into the statute under the enforcement powers of the Attorney General. Section 3613[211] gives the government the power to bring an action for relief whenever it has reason to believe that the defendant has engaged in a *pattern or practice* of resistance to the right to fair housing, or that a group of people have been denied fair housing rights and this denial raises an issue of general public importance. The guidelines developed by this action call for a showing of discriminatory effect.[212] If it is sufficient for the government to show that a pattern or practice is prima facie discriminatory in effect, the individual plaintiff should bear a standard no more burdensome. The government's interest in protecting its citizens from discriminatory housing practices is no greater than the individual's right to protect himself from such civil rights violations.[213]

4. Discriminatory Effect Is the Standard in other Civil Rights Legislation

A third consideration is that the prima facie standard of discriminatory effect has been applied to establish discrimination under other civil rights legislation. Title VII of the Civil Rights Act of 1964[214] has long used the discriminatory effects standard of review

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[210] 114 CONG. REC. 9563 (1969) (remarks by Rep. Celler).

[211] Fair Housing Act 42 U.S.C. § 3613 (Supp. III 1973) provides:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter . . . and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

[212] *See* United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973); United States v. Henshaw Bros. 401 F. Supp. 399 (E.D. Va. 1974).

[213] *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

[214] 42 U.S.C. §§ 2000e *et seq.* (Supp. IV 1974).

in employment practices[215] which the Supreme Court upheld in *Griggs v. Duke Power Co.*[216] in 1971. In this case the Court dealt with the question of whether certain test requirements for jobs were illegal where the jobs had previously been given only to whites, and the new qualifications, which excluded more blacks than whites, were unrelated to job performance. In holding that such tests were illegal, the Court declared that "practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[217] According to the Court, Title VII proscribes all practices which are discriminatory in form or operation unless such practices arise from legitimate business necessity.

The Seventh Circuit Court of Appeals, the court which will rehear the *Arlington Heights* case on the merits of the Title VIII claim, extended the Title VII standard in *Griggs* to cover rights guaranteed under another civil rights statute, the Civil Rights Act of 1866, Section 1982.[218] In *Clark v. Universal Builders*,[219] the court found that as a result of the racially segregated housing market in Chicago, the defendants were able to charge blacks a higher price than whites were charged for the same homes. The court held that a prima facie case of discriminatory effect had been proven upon a showing that such action was an exploitation of a discriminatory situation.[220] Once this standard had been met, "the burden of proof [shifted] to the defendants to articulate some legitimate, nondiscriminatory reason for the price and term differential."[221]

Since all of the civil rights statutes have the same essential purpose, that is, to eliminate public and private racial discrimination, the interpretation which the courts have given to one statute should be similar to that given to related statutes.[222] Therefore, the Title VII prima facie standard of discriminatory effect which the Supreme Court approved in *Griggs*, should be adopted as the standard in all civil rights cases alleging racial discrimination, including

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[215] *See* EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1975).
[216] 401 U.S. 424 (1971).
[217] *Id.* at 430.
[218] *See* note 46, *supra*.
[219] 501 F.2d 324 (7th Cir. 1974), *cert. denied,* 419 U.S. 1070 (1974).
[220] 501 F.2d at 331.
[221] *Id.* at 334.
[222] *See* 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 72.07 (1974).

those exclusionary zoning cases brought under rights guaranteed by Title VIII.

5. Judicial Application

The Eighth Circuit decision in *United States v. City of Black Jack*[223] affords the most positive instance of the application of this statutory standard in a zoning case. The *Black Jack* case incorporated all of the fundamentals of an exclusionary zoning challenge; the city was within St. Louis County, the suburban areas of which were becoming almost exclusively populated with affluent whites, while the percentage of blacks in St. Louis was increasing.[224] Planners sought to remedy this disparity by the construction of low income housing in Black Jack, one of the St. Louis suburbs.[225] When this plan was revealed, Black Jack's city council enacted a zoning ordinance prohibiting the construction of any new multiple-family dwellings.[226] The court held that such action was prohibited by Title VIII: "The discretion of local zoning officials . . . must be curbed where 'the clear result of such discretion is the segregation of low-income blacks from all-white neighborhoods.' "[227]

The *Black Jack* Court held that the burden of proof in Title VIII cases was satisfied by the showing of a racially discriminatory effect.[228] While proof of a discriminatory purpose would be considered, "effect, and not motivation, is the touchstone . . . ."[229] Once a racially discriminatory effect was established, a prima facie case under Title VIII had been made and the burden shifted to the municipality to demonstrate that the ordinance furthered some legitimate, nondiscriminatory municipal policy of overriding importance.[230]

[223] 508 F.2d 1179 (8th Cir. 1974).

[224] *Id.* at 1183.

[225] *Id.* at 1182. The City was not incorporated until two months after HUD issued a "feasibility letter" which gave preliminary approval for federal funding of the low income housing.

[226] *Id.* at 1183. The City Council acted within six days of commencing operation as a municipal governing body.

[227] *Id.* at 1184. The court quoted from the decision of Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

[228] United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974).

[229] *Id.* at 1185.

[230] *Id.* at 1186-87. The court held that the reasons advanced by the city were not sufficiently compelling. The three primary interests were road and traffic control, prevention of overcrowded schools, and prevention of devaluation of adjacent single family homes.

It is not certain that this concept of prima facie case based on effect rather than motive, will be followed by the other circuit courts or by the Supreme Court in Title VIII cases. In fact, the Second Circuit refused to adopt this standard in a class action housing case decided shortly after *Black Jack.*[231] The argument is persuasive, however, that this standard should be adopted based upon congressional intent, statutory construction, and judicial interpretation of other civil rights legislation. If this reasoning prevails, statutory challenges of exclusionary zoning under Title VIII may become a successful alternative to constitutional zoning challenges in light of the difficult motivational standard of the *Arlington Heights* case.

CONCLUSION

It seems clear that the aggressive action taken by the circuit courts in striking down exclusionary zoning practices[232] is going to be severely limited by the new standard of review formulated by the Supreme Court in *Washington v. Davis.*[233] The decision handed down this term in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[234] has applied this standard to the first equal protection challenge of an allegedly racially discriminatory zoning decision to reach the Supreme Court in fifty years.[235] Those wishing to attack the constitutionality of exclusionary zoning in federal courts are faced with proving a discriminatory motive rather than establishing the resultant discriminatory effect.

This motivational analysis is a more difficult burden to sustain because it involves the subjective process of attitude determination.[236] Although the Supreme Court in *Davis* and *Arlington Heights*

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[231] Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975) In this case, the Second Circuit refused to find a violation of the Fair Housing Act in the landlord's application of the 90% rule requiring a weekly net income equal to at least 90% of the monthly rent. This rule operated to exclude almost all public welfare families, a large proportion of whom were black and Puerto Rican. The court refused to draw the statistical correlation between wealth discrimination and racial discrimination and would not adopt a discriminatory effects test. Judge Mansfield, in a masterly dissent, urged the adoption of the *Griggs* effect test for claims of Title VIII discrimination in housing. *Id.* at 1115 (Mansfield, J., dissenting).

[232] *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974); Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1972), *rev'd*, 528 F.2d 867 (6th Cir. 1975); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

[233] 426 U.S. 229 (1976); see text at notes 64-84, *supra*.

[234] 97 S. Ct. 555 (1977).

[235] See text at note 59, *supra*.

[236] See text at notes 102-25, *supra*.

gave some guidance for making this determination,[237] the standard for proving discrimination in zoning may have become too narrow for effective use in most zoning challenges. There are three ways in which a local zoning board can impede or prevent the entry of minorities into its community: it can subject certain zoning decisions to voter aproval through a referendum, it can rezone property which has been acquired for minority housing, or it can refuse to rezone in order to permit such housing.[238] Only the active response of rezoning lends itself to the immediate proof of discriminatory motivation. Since most zoning boards committed to exclusionary tactics have avoided the necessity of such obvious action, the success of future challenges to such zoning in the courts will be precarious.

The merger between economic and racial classifications appears equally uncertain. The Supreme Court refuses to allow challenges of discrimination against low income families under the umbrella of strict scrutiny traditionally restricted to challenges of invidious racial discrimination.[239] There may be societal reasons for this reluctance. Racial discrimination is intolerable in America, while economic gradations are basic to the capitalistic structure. Poverty is circumstantial and can weigh partially or fully on people; race is absolute. Finally, poverty is arguably remediable and one of the most purely American concepts is the ability of every man to escape the confines of poverty. These considerations, coupled with the judicial attitude that the equal protection clause may have been applied too broadly as a cure for all of society's ills, militate against the success of an attack of exclusionary zoning based on the correlation between racial and economic discrimination.

Given these setbacks in constitutional challenges of exclusionary zoning, reliance must be placed in the statutory guarantees of the Fair Housing Act. This legislation was passed to provide a remedy for continuing discrimination and segregation in housing and, by extension, zoning. As a broad civil rights statute, it has been liberally construed by the courts to effectuate its purposes. It is clear that the Act goes beyond the protection afforded by the equal protection clause and, therefore, the standard to determine the existence of discrimination in violation of the statute should be broader.

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[237] See text at notes 78, 94-95, *supra*.

[238] *See* Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396, 403-04 (N.D. Ill. 1971).

[239] *See* James v. Valtierra, 402 U.S. 13 (1971); Warth v. Selden, 422 U.S. 490 (1975).

Convincing evidence exists that the standard should be the prima facie showing of racially discriminatory effect. This standard, which has been adopted by the Supreme Court in Title VII cases,[240] has been applied by lower courts in Title VIII cases.[241] If this standard is accepted by the Seventh Circuit Court when the *Arlington Heights* case is reheard, MHDC will surely be able to sustain its burden of proof of racially discriminatory effect based upon the ultimate impact of the segregated Chicago housing market.[242] This success would open the courtroom doors to exclusionary zoning challenges, thus rekindling hope which has been weakened by the Supreme Court's pronouncements in *Davis* and *Arlington Heights*.

The attack on exclusionary zoning could also be refocused through pressures applied to state legislatures. There are limitations to attacking exclusionary zoning in the courts, even if the courts accept the most liberal standard applicable to the Fair Housing Act. One of the main drawbacks is the individualized nature of each challenge. Those who wish to put an end to the practice of exclusionary zoning aim for a favorable court ruling with the hope that this ruling will have precedential value in succeeding controversies.[243] Others, with similar goals, look to the state legislatures to provide a more comprehensive remedy.[244] The Douglas Commission, in its report on urban problems, recommended state legislation giving a state agency broad review powers over local zoning decisions.[245] Per-

[240] *See* United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) and Bing v. Roadway Express, 485 F.2d 441 (5th Cir. 1973).

[241] *See* United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973); United States v. Bob Lawrence Realty, 474 F.2d 115 (5th Cir. 1973); Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974), *rev'd*, 528 F.2d 867 (6th Cir. 1975).

[242] See text at note 53, *supra*.

[243] *See* Note, *The Inadequacies of Judicial Remedies in Cases of Exclusionary Zoning*, 70 MICH. L. REV. (1976). *See also* BROOKS, *supra* note 5, at 27.

[244] One legislature which has responded is the General Court of the Commonwealth of Massachusetts. The Massachusetts statute, MASS. GEN. LAWS ch. 403 §§ 20-23 (Supp. 1975), was enacted to stimulate the construction of low and moderate income housing in the suburbs. Under the terms of the statute, any limited dividend corporation or housing authority intending to build subsidized housing submits one application to a local zoning board of appeals. After a public hearing, the board may (1) approve the application and issue a comprehensive permit; (2) approve the application with certain conditions or requirements; or (3) deny the application. The board must act quickly within a given time or approval is automatic. If the application is denied, or if the approval requires conditions which make the construction economically unfeasible, the organization can appeal the decision to a state agency, the Housing Appeals Committee. *See* BROOKS, *supra* note 5, at 31; EQUAL OPPORTUNITY IN SUBURBIA, *supra* note 7, at 53-55.

[245] *Douglas Commission Report, supra* note 4, at 239-40. *See also* Brown, *State Land Use Laws and Regional Institutions*, 4 ENV. AFF. 393 (1975) for proposals to strengthen the powers

haps the recommendation of the United States Commission on Civil Rights should be followed, which conditions the receipt of federal housing and community development grants upon the creation of state agencies to oversee local zoning boards.[246]

Lobbying for such legislation is undoubtedly a long and possibly fruitless process, and any statute eventually enacted may be vitiated by amendment.[247] For the present, the challengers of exclusionary zoning must rely on the immediate, albeit individualized, hope afforded by the rights guaranteed under the Fair Housing Act.[248] It is on this battlefield that victory appears most promising.

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of regional planning agencies and to redistribute local land use functions.

[246] EQUAL OPPORTUNITY IN SUBURBIA, *supra* note 7, at 69.

[247] The Massachusetts statute, described *supra* note 244, which is the only one of its kind to date, has been attacked for being too passive by depending on the initiative of the federally-subsidized organizer. Also, the law excludes profit-making firms and provides loopholes which enable local governments to refuse construction of low income housing. *See Wilson and Colura: A Setback for Regionalism*, 5 ENV. AFF. 477, 492-96 (1976) for description of the shortcomings of Chapter 774 both statutorily and judicially.

[248] The Seventh Circuit Court of Appeals held, on remand of *Arlington Heights*, that to establish a violation of the Fair Housing Act a showing of discriminatory effect may be enough. The sufficiency of such a standard depends upon four factors: (1) the strength of the demonstrated discriminatory effect; (2) the extent of the evidenced discriminatory intent (although this is the least important factor and can be waived); (3) the nature of the defendants' interest in the proposed action (i.e., was it public or private); and (4) the nature of the relief sought (affirmative action, as opposed to mere non-interference).

Although the court of appeals discussed each factor, it instructed the trial court to grant relief to the plaintiffs if they could satisfy the first standard; that is, a strong showing of discriminatory effect. *See* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, No. 74-1326 (7th Cir. July 7, 1977).