Touro Law Review

Volume 7 | Number 1 Article 5

1990

Determining a Standard for Housing Discrimination Under Title VIII

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DETERMINING A STANDARD FOR HOUSING DISCRIMINATION UNDER TITLE VIII

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When the complaint was filed in 1981, it appeared that *Huntington Branch, NAACP v. Town of Huntington*[1] would become a case of enormous importance that would finally determine whether the appropriate test in cases brought under the Fair Housing Act (Title VIII)[2] was "discriminatory intent" or "discriminatory effect." If the "intent" test were to be adopted, the exercise of broad local zoning powers would be virtually immune from federal attack; if the "effect" test were to be adopted, any zoning enactment would be vulnerable as potentially having some discriminatory effect.

In this participant's view, *Huntington* not only failed to settle the issue, but in light of its unusual rationale and result, and the later developments in Title VII[3] law, it has become almost an aberration. Certainly, *Huntington's* importance will substantially diminish as Title VIII law further develops.

The burdens and mechanics of proof that the Second Circuit elucidated in *Huntington II*[4] have already been eroded by the Supreme Court's recent Title VII decisions in *Watson v. Fort Worth Bank & Trust*,[5] *Wards Cove Packing Co. v. Atonio*,[6]

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1. 530 F. Supp. 838 (E.D.N.Y. 1981), *rev'd*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (*Huntington I*).

2. Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1988).

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

4. Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*). *See infra* notes 27-39 and accompanying text.

5. 487 U.S. 977 (1988). *Watson* stated "that the plaintiff's burden in establishing a prima facie case goes beyond . . . statistic[s]." *Id.* at 994. Plaintiffs, rather, must identify the specific employment practice that is challenged and prove causation. *Id.* In addition, the Court explained that "the ultimate burden of proving that discrimi-

which the Second Circuit, in *Lowe v. Commack Union Free School District*,[7] recognized as "established law" under Title VII, and *Price Waterhouse v. Hopkins*.[8] If plaintiffs are ultimately relieved of proving discriminatory intent to establish Title VIII violations, these cases indicate that draconian burdens will continue to be imposed upon them as they attempt to establish discriminatory effect.[9] Municipal defendants are odds-on favorites to retain extraordinary zoning powers.

In *Huntington I*, the complaint alleged both intentional discrimination under the fourteenth amendment and statutory violations under Title VIII.[10] Plaintiffs sought injunctive relief directing the Town to rezone a fourteen-acre parcel of property, in an area described as "95% white" and which one of the plaintiffs claimed to have an option to purchase,[11] so that one hundred and sixty-two units of low-income housing could be constructed upon the site.[12] The plaintiffs originally repre-

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nation against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* at 997-98.

6. 109 S. Ct. 2115 (1989). *Wards Cove* laid to rest the notion that a "business necessity" justification for a challenged employment practice was an affirmative defense as to which the employer carried the burden of proof. *Id.* at 2126. The Court stated that "the employer carries the *burden of producing evidence of a business justification* for his employment practice," but that "[t]he *burden of persuasion . . . remains with* the disparate-impact *plaintiff*." *Id.* (emphasis added).

7. 886 F.2d 1364, 1370 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990).

8. 109 S. Ct. 1775 (1989). *Price Waterhouse* held that a defendant could escape Title VII liability by showing "that it would have made the same decision[s] in the absence of the unlawful motive." *Id.* at 1790.

9. *See infra* notes 85-92 and accompanying text.

10. Huntington Branch, NAACP v. Town of Huntington, 530 F. Supp. 838, 839 (E.D.N.Y. 1981), *rev'd*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (*Huntington I*).

11. *Huntington I*, 689 F.2d at 392. As recently as late 1989, the plaintiff, Housing Help, Inc. was still in litigation in state court with the owner of the property, who had refused to convey title to it, charging that he was fraudulently induced to enter into the option agreement. The existence of the state court litigation was not disclosed by the plaintiffs to the federal courts, and thus the Second Circuit directed the Town to rezone the land without knowing that Housing Help's entitlement to the land was not definitively established.

12. *Id.* Plaintiffs claimed that the Town's multi-family dwelling ordinance provision limited private development of such uses to the minority-impacted area in Huntington Station—the site of the Town's urban renewal project of the 1960's. The ordinance, adopted to encourage private investment in a blighted area, never-

sented that they relied upon funding under the Section 8 program;[13] when funding for that program was suspended, the defendants moved to dismiss the complaint for lack of standing,[14] citing *Warth v. Seldin*,[15] and *City of Hartford v. Towns of Glastonbury*.[16] The original district judge, Mark Costantino, granted the motion,[17] and the plaintiffs appealed to the Second Circuit, which reversed and reinstated the complaint,[18] holding that "indeterminacy of financing" did not preclude standing.[19]

After several years of pretrial discovery,[20] a trial was had before Judge I. Leo Glasser,[21] who ultimately dismissed the

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theless permitted the Town's Housing Authority to construct public housing, for low-income individuals, in any portion of the Town. *See id.* at 775.

13. *Id.* at 392. The Second Circuit explained that "[t]he project was to be developed as a so-called HUD Section 8 new construction housing program in cooperation with National Housing Partnership, an organization sponsoring low cost housing projects." *Id.* In order to receive Section 8 funds, applicants must submit plans to HUD outlining the housing needs of the municipality. If the goals sought to be achieved by the plan are realistic, HUD will approve the plan and provide construction funds to the applicant. *Id. See* United States Housing Act of 1937, § 8, 42 U.S.C. § 1347(f) (1976).

14. *Huntington I*, 689 F.2d at 393.

15. 422 U.S. 490, 508 (1975).

16. 561 F.2d 1032, 1037 (2d Cir. 1976), *rev'd*, 561 F.2d 1048 (2d Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1034 (1978).

17. Huntington Branch, NAACP v. Town of Huntington, 530 F. Supp. 838, 846 (E.D.N.Y. 1981), *rev'd* 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (*Huntington I*).

18. *Huntington I*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

19. *Id.* at 394-95.

20. On November 7, 1983, Judge Glasser certified a plaintiff class consisting of "[a]ll black, Hispanic and lower income persons in need of lower cost housing opportunities in Huntington and surrounding areas and who would qualify for residency in [plaintiffs' project] . . . and who seek to reside in and insure opportunity for racially and economically integrated housing in Huntington." Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 764 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

21. On November 2, 1982, after the Second Circuit ruling, Judge Costantino stated, "I order reassignment of the case since, in this court's opinion, the remedy would be speculative at most." Civil Docket Continuation Sheet at 3, Huntington Branch, NAACP v. Town of Huntington, 530 F. Supp. 838 (E.D.N.Y. 1981), *rev'd*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (No. 81-0541) (*Huntington I*).

complaint on the merits,[22] finding that the evidence "did not give rise to an aura of discriminatory intent;"[23] the showing of discriminatory effect was "not particularly strong;"[24] the Town's actions "with respect to the zoning process and housing in general were supported by rational and legitimate concerns,"[25] and the Town's reasons "ha[d] not been exposed as pretextual."[26]

Upon the plaintiffs' second appeal, the Second Circuit, terming "[t]he prima facie standard for Title VIII disparate impact cases involving public defendants . . . a question of first impression in this circuit,"[27] reversed and granted judgment for the plaintiffs. The court held that they had established a prima facie case under Title VIII by showing that a "significant percentage"[28] of the tenants in the plaintiffs' proposed project "would be minority"[29] and that the Town's refusal to amend its ordinance "to permit privately-built multi-family housing outside [of] the urban renewal area perpetuated segregation."[30]

The court then stated that the Town had not carried the burden of proof, which had *shifted to it* after establishment of a prima facie case, to justify its actions.[31] It failed to "*prove*

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22. *Huntington II*, 668 F. Supp. at 788.

23. *Id.* at 786.

24. *Id.*

25. *Id.*

26. *Id.* at 787.

27. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

28. *Id.* at 933 (quoting Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762, 781 (E.D.N.Y. 1987)).

29. *Id.*

30. *Id.* at 938. The Town argued below that the ordinance did not *cause* or perpetuate segregation. *See Huntington II*, 668 F. Supp. 762, 785 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989). The trial evidence showed that no builders came forward to construct multi-family housing in the Town for a variety of sound, non-discriminatory reasons. *See id.* at 786.

31. *Id.* at 936. The court stated that "the *defendant must prove*" that it had justifiable reasons for its discriminatory practice. *Id.* (emphasis added). *But see* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989) (placing a less stringent burden on Title VII defendants). *See supra* note 6.

that its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect,"[32] citing *Resident Advisory Board v. Rizzo*.[33] The court expressly rejected arguments based upon *McDonnell Douglas Corp. v. Green*,[34] which, after establishment of a prima facie case by the plaintiff, merely required the defendant to *articulate* a legitimate, bona fide reason for its actions.[35] Under *McDonnell Douglas*, the burden of proof at all times remained upon the plaintiff, who was required to prove that the articulated reasons were pretextual.[36]

In analyzing the Town's reasons, the court refused to consider evidence adduced at the trial indicating that there were, among others, serious sewage disposal problems associated with plaintiffs' site.[37] The court termed these "*[p]ost hoc* rationalizations . . . [entitled to] 'little deference' by the courts."[38] The court then imposed injunctive relief upon the Town, while conceding that such action taken at the court of appeals level was extraordinary.[39]

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32. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

33. 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

34. 411 U.S. 792, 802 (1973).

35. *Id.*

36. *Id.* at 802, 804.

37. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 936, 940 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

38. *Id.* (quoting Securities Indus. Ass'n v. Board of Governors, 468 U.S. 137, 143-44 (1984)).

39. *Id.* at 941. The court found the case extraordinary because it had taken so long to proceed through the courts. *Id.* The relief directed the Town to rezone, for multi-family use, the 14-acre parcel of the plaintiffs, rejecting the Town's assertion, accepted below by Judge Glasser, that no site-specific zoning application had ever been presented to it. *Id.* at 932. It would have been more appropriate to limit the relief to a declaration of invalidity of the zoning ordinance restriction, leaving it to the plaintiffs to make, and process in the normal fashion, a zoning application for their property; or alternatively, to remand so that the trial judge, who was most familiar with the facts, could fashion appropriate relief. It seemed clear that the court of appeals did not wish to leave the ultimate rezoning of the property to chance.

The Town, now cast as an appellant, took a direct appeal to the Supreme Court.[40] The plaintiffs, respondents for the first time, moved to dismiss or affirm.[41] The Solicitor General then filed an *amicus curiae* brief on behalf of the United States.[42]

The Solicitor General took a middle ground on the appeal. He agreed with the Town that the case properly fell within the Court's mandatory appeal jurisdiction, and that a decision on the merits could not be avoided.[43] He argued that "there is a substantial question, meriting this Court's attention, as to whether an intent test or an effects test governs under Title VIII."[44]

But he suggested to the Court that it need not make Title VIII precedent, because, he said, although the Town had "technically preserved the position that an intent test should be applied with regard to the rezoning decision . . . [its argument] ha[d] been pressed in an ambiguous and internally inconsistent manner."[45] Thus, the Court only needed to decide that the evidence in the record supported the result reached by the Second Circuit, without endorsing that result.[46] He also suggested that

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40. Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (*Huntington II*). The case implicated the Court's appeal jurisdiction, as contrasted with its certiorari jurisdiction, because the court of appeals had invalidated a state statute on federal grounds. *Id.* at 18. *See* 28 U.S.C. § 1254(2) (1982), *amended by* 28 U.S.C. § 1254 (1988). For purposes of the Supreme Court's appellate jurisdiction, a local ordinance is treated as a state statute. *See* City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).

41. *Huntington II*, 488 U.S. at 17-18.

42. Brief for the United States as Amicus Curiae, Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988) (No. 87-1961) [hereinafter Amicus Brief] (*Huntington II*). Such action is unusual at the jurisdictional statement stage of the litigation. For a discussion of the role of the Solicitor General, see L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

43. Amicus Brief, *supra* note 42, at 9.

44. *Id.* at 10.

45. *Id.* at 11-12.

46. The Solicitor General was referring to the Town's argument below that the "discriminatory treatment" test of McDonnell Douglas v. Green, 411 U.S. 792 (1973), was applicable to the claim related to the Town's alleged failure to rezone the plaintiffs' option property, whereas the "discriminatory effects" test derived from Griggs v. Duke Power Co., 401 U.S. 424 (1971), as refined by Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), was to be applied to challenge the validity of the general zoning provision. Huntington Branch, NAACP v. Town of Huntington,

the Court need not assume jurisdiction over that portion of the case challenging the court of appeals' grant of site-specific relief, which lay within the Court's certiorari jurisdiction.[47]

The Court followed the Solicitor General's lead. By a six to three vote,[48] it affirmed on the basis suggested by the Solicitor General.[49] The Court expressly reserved the right to rule in a future case on the appropriateness of the Title VIII test applied by the Second Circuit,[50] and declined to exercise its discretionary jurisdiction over the part of the case that challenged the Second Circuit's site-specific zoning relief.[51]

It is impossible to know the actual motivations of Supreme Court Justices, but at first blush it was a stunning surprise that the entire "conservative" wing of the Court voted to deny full review to the expansive decision of the Second Circuit, while two Justices generally perceived as "liberal," Marshall and Stevens, desired full review. The explanation may relate to the fact that, while this appeal was under consideration, the Court decided *Watson*,[52] and during the same Term, the Court was to render decisions in *Wards Cove*[53] and *Price Waterhouse*,[54] which would substantially increase the evidentiary burdens imposed upon plaintiffs in Title VII litigation.[55]

It has been a cardinal tenet for twenty years, reiterated by the Second Circuit in *Huntington II*, that Titles VII and VIII are part of a unified scheme of civil rights laws, and that pre-

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844 F.2d 926, 934 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988) (*Huntington II*). It is clear that discriminatory intent is an essential ingredient of the *McDonnell Douglas* test and a significant, but arguably not a necessary element of the *Griggs* test. *See id.* at 934-35. The Second Circuit refused to separate the claims and tested both claims by a modified *Griggs* standard, which included elements of Resident Advisory Bd. v. Rizzo, 564 F.2d. 126 (3d Cir. 1977). *Id.* at 939-41.

47. Amicus Brief, *supra* note 42, at 11.

48. The dissenting justices, White, Marshall and Stevens, voted to note probable jurisdiction and set the case for oral argument. Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988) (*Huntington II*).

49. *Id.*

50. *Id.*

51. *Id.*

52. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

53. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

54. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

55. *See supra* notes 5-8 and accompanying text.

cedent in Title VII cases applies to Title VIII.[56] How did the Court, which was about to sharply restrict Title VII plaintiffs' rights, consciously decide to let stand a Title VIII decision which, in light of its fresh decision in *Watson* and its imminent decisions in *Wards Cove* and *Price Waterhouse*, applies all the wrong tests?

The answer which seems most plausible at this point in time is that *Huntington's* facts were "bad" from a conservative point of view. It would have been difficult to sustain a statute which appeared on its face to restrict to an area of minority concentration the type of dwellings statistically much more likely to be occupied by minorities. Perhaps the Solicitor General desired to afford the Court an escape from the quandary presented by the fact that this unattractive case clearly implicated the Court's mandatory jurisdiction, because he too feared that an unpalatable result might be mandated. On the other hand, Justices Marshall and Stevens may have seen *Huntington II* as an excellent vehicle for the announcement of broad rights for Title VIII plaintiffs.

Admittedly, speculation as to the motives of the actors in this drama is a hazardous exercise, but a comparison of the Court's action in *Huntington II* with what it was in the process of doing in the Title VII cases, seems to suggest that the foregoing analysis may be valid.

In affirming *Huntington II*, the Supreme Court left the door wide open for a future municipality to make a number of claims that Huntington unsuccessfully pressed in this case.[57] For municipal attorneys, perhaps the most important claim left open in *Huntington II*, is one that the Town in this case never had an opportunity to make before the fact. That is, that relief in a civil rights case should be fashioned in the first instance by the trial court, and that only a truly extraordinary fact pattern can justify imposition of relief in the first instance by an appel-

56. *See* Huntington Branch, NAACP, v. Town of Huntington, 844 F.2d 926 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158-60 (1976).

57. *Huntington II*, 488 U.S. at 15.

late court.[58] In *Huntington II*, the Second Circuit justified granting relief at the appellate level because the case had been litigated for such a long period of time—seven years.[59] Yet, other judges have not seen delay as justifying the grant of extraordinary relief.[60] Although Judge Conner of the Southern District of New York in *Strykers Bay Neighborhood Council, Inc. v. City of New York*,[61] described that case as a "sequel to a *nine*-year legal battle over the development of . . . the West Side Urban Renewal Area,"[62] he thought it was time to lay a frivolous suit to rest.[63] The inference seems inescapable that the Second Circuit, having reversed the trial court's determination dismissing the complaint, was loath to allow the same trial judge to exercise his discretion in fashioning appropriate relief.

Before *Huntington II*, it was black-letter law that zoning powers were uniquely to be exercised by elected local officials,[64] and their decisions were to be afforded great deference;[65] that environmental questions ought properly to be first considered by the local legislative and administrative officials

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58. *See Huntington II*, 844 F.2d at 941.

59. *Id.*

60. It is unusual for a trial court to direct the exercise of zoning powers in a particular fashion with respect to a specific site, *see* United States v. City of Yonkers, 487 U.S. 1251 (1989), and in this participant's view, even more unusual in the absence of the prior processing of an application for that relief to the municipal body having jurisdiction. Further, it seemed to the Town that the appellate court, in *Huntington II*, transgressed the Supreme Court's pronouncement in Hills v. Gautreaux, 425 U.S. 284 (1976) (in dicta, the Court distinguished between the scope of a district court's equitable powers in cases where merely statutory, rather than constitutional, violations had occurred), by restructuring the operations of a government entity in the absence of a finding of a constitutional violation. *Id.* at 296.

61. 695 F. Supp. 1531 (S.D.N.Y. 1988).

62. *Id.* at 1533.

63. *See id.* at 1533-34. From this author's perspective, mere length of the litigation, without willful delay by the municipal defendant, did not provide sufficient reason for the court of appeals to emasculate the District Judge, who was intimately familiar with the facts, proofs, and parties.

64. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974). The Second Circuit referred to the Town's interest in its zoning regulations as "substantial." Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

65. *See Village of Belle Terre*, 416 U.S. at 8. The Court stated that zoning ordinances will be upheld against constitutional attack, as long as they are reasonable

and not by the courts,[66] and that the relief granted in a civil rights case should not be broader than necessary to remedy the violation.[67] It was also well-settled that federal courts' remedial powers did not extend to restructuring the operation of local and state government entities, in the absence of a constitutional violation.[68]

There seems little basis to think that these well-settled rules will fall on the basis of the *Huntington II* decision. The Second Circuit itself recognized its grant of site-specific zoning relief as extraordinary.[69] It found the Town's zoning code provision to have a discriminatory effect,[70] although no evidence was adduced to show a causal relationship between the existence of the ordinance and the patterns of racial development in the Town.[71] When it explained why it was rejecting the Town's arguments for maintaining the code provision, the Court engaged in speculation, unsupported by the record, by saying that "developers prevented from building outside the urban renewal area will more likely build in another town, not the urban renewal area."[72]

The court also refused to consider the Town's planning, zoning and health reasons, supported both by fact and expert witnesses at the trial,[73] which would have dictated denial of a site-specific rezoning application, had one been made. Ignoring the

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and have "a rational relationship to a permissible state objective." *Id.* (citation omitted).

66. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 393-94 (1926).

67. *See* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS §§ 341-342 (1980). Professor Antieau states "that under the Fair Housing Act, 'relief should be aimed toward twin goals-insuring that no future violations of the Act occur and removing any lingering effects of past discrimination.' " *Id.* § 342, at 594 (quoting United States v. Center-in-the Grove Apartments, 557 F.2d 1079 (5th Cir. 1977).

68. Hills v. Gautreaux, 425 U.S. 284, 293 (1976).

69. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 941 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

70. *Id.* at 938.

71. *See Huntington II*, 668 F. Supp. 762, 786 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). Indeed, the trial proof showed the southern Greenlawn area to be at least as racially concentrated as the urban renewal area, and no ordinance concentrated multiple dwellings in that area.

72. *Huntington II*, 844 F.2d at 939.

73. *See id.* at 940.

fact that no such application was ever made or denied and that there was, therefore, no record of the reasons for a denial, the court termed the trial evidence nothing more than "*[p]ost hoc rationalizations.*"[74] The court also made it clear, contrary to the Supreme Court's later decisions in *Watson*[75] and *Wards Cove*,[76] that the burden of justifying its decisions lay on the Town.[77] And the appellate panel obviously did not believe that it was restructuring the operation of a local government entity.[78]

The Supreme Court was more circumspect. In affirming the part of the Second Circuit's decision that lay within the Court's mandatory jurisdiction, on the asserted basis that the

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74. *Id.*

75. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

76. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

77. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

78. In apparent violation of Federal Rules of Civil Procedure 52(a), the court ignored the trial judge's finding that plaintiffs had never submitted a site-specific rezoning request, *Huntington II*, 844 F.2d at 932, which, based on the evidence, was not "clearly erroneous." It found instead that the Town had received, considered, and denied the plaintiff's proper zoning request, which would have eliminated a geographical restriction precluding private developers from applying for multi-family uses outside of the former urban renewal area of Huntington Station—an area which was 52% minority in population. *Id.* at 937-38. The court's finding should, logically, have resulted in the grant of limited relief, invalidation of the code provision. Such relief would have removed the asserted impediment to a site-specific rezoning application, and allowed the plaintiffs to make such an application if they chose to do so. *See supra* note 39.

Although the Town later argued to the Supreme Court that the court of appeals had "restructured" local government operations, the Court declined jurisdiction over the relief portion of the case and hence never reached the question. *Huntington II*, 488 U.S. at 18. It is doubtful that the Second Circuit panel thought that it was "restructuring" local government procedures by fashioning a remedy. Judge Newman probably summarized the thinking of the court by stating, at the oral argument, that "[i]f they [the Town officials] don't build some low-cost housing, they are at risk that the applicant who finds an acceptable spot wins." Transcript of oral argument at 16, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*). Such analysis, of course, is not generally shared by zoning lawyers, and seems to fly in the face of Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974) (stating that a municipality has no affirmative duty to build housing), and further begs the question as to who shall make the decision that housing in a particular location is "acceptable."

Town of Huntington had agreed to the "effects" test applied by the Second Circuit,[79] the high Court left it open to a future municipal defendant to argue that a Title VIII action necessarily includes an element of intent—*Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[80] strongly so suggests.[81] The Court also remains free to expressly adopt in Title VIII cases the rationales of *Watson*, *Price Waterhouse*, and *Wards Cove*, and thereby revitalize Judge Glasser's *McDonnell Douglas* analysis[82] which the Second Circuit so firmly rejected.[83]

Huntington II showed that the parity of construction between Titles VII and VIII which the courts have recognized for twenty years, is alive and well,[84] and it is difficult to see how the Supreme Court's recent Title VII cases will not severely undercut the Second Circuit's rationale here.

If the Court ultimately finds, as it has in the case of Title VII, that discriminatory intent is not a necessary ingredient of a Title VIII case, it still seems likely, in light of *Wards Cove*,[85]

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79. *Huntington II*, 488 U.S. at 18. The Town, however, most assuredly did not agree with the Second Circuit's test. *See supra* note 46 and accompanying text. *See also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934.

80. 429 U.S. 252 (1977).

81. *Id.* at 264-66.

82. Huntington Branch, NAACP v. Town of Huntington, 668 F. Supp. 762 (E.D.N.Y.), *rev'd*, 844 F.2d 926 (2d Cir. 1987), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*). Judge Glasser stated that once plaintiffs had established "a *prima facie* case, defendants must rebut it, and if defendants articulate a legitimate, nondiscriminatory reason for their conduct, plaintiffs must show that the reason is a pretext." *Id.* at 782.

83. *Huntington II*, 844 F.2d at 939. Judge Kaufman, however, stated that "the *McDonnell Douglas* test . . . is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here. No circuit, in an impact case, has required plaintiffs to prove that defendants' justifications were pretextual." *Id.*

84. Judge Goettel, in People v. Merlino, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988), referred to *Huntington II* in stating that "the Second Circuit has 'pointedly' reaffirmed the view that Title VII cases are relevant to Title VIII cases on recognition of the fact [that] the 'two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination.' " *Id.* (citation omitted).

85. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). *See supra* note 6 and accompanying text.

Watson,[86] and *Price Waterhouse*,[87] that the burden of proof in housing discrimination cases will remain always with the plaintiff.[88] The defendant's burden of production will be to *articulate* a nondiscriminatory motivation for taking the action, which the plaintiff must show to be pretextual, or the defendant may show that the action would still have been taken "but for" the discriminatory motivation.[89] The plaintiff's statistical proof will be subject to closer scrutiny than that afforded in *Huntington II*.[90] Additionally, there must be a causal connection shown between the defendant's action and "a sufficiently substantial" statistical disparity and hence the plaintiff's damage.[91] Finally, the judiciary will proceed with care before mandating that a defendant municipality adopt a plaintiff's proposed rezoning, since courts are generally less competent than towns to make zoning decisions.[92]

In *Strykers Bay*,[93] Judge Conner appeared to reject the precedent established by the Second Circuit in *Huntington I* and *Huntington II*. In that case, plaintiffs claimed violation of their civil rights due to the city's designation of development property, in an urban renewal area, for luxury housing, when that area had previously been set aside for development of low in-

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86. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). *See supra* note 5 and accompanying text.

87. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). *See supra* note 8 and accompanying text.

88. *See Watson*, 487 U.S. at 997-98 (1988); *see also* notes 5-8 and accompanying text.

89. *See Wards Cove*, 109 S. Ct. at 2126; *see also Price Waterhouse*, 109 S. Ct. at 1790.

90. *See Watson*, 487 U.S. at 994.

91. Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1370-72 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990). *See supra* note 7 and accompanying text.

92. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974); *see supra* notes 64-65 and accompanying text. The *Huntington II* decision has been cited by Judge Mukasey of the Southern District of New York, as enunciating the Second Circuit's view that the "fashioning of a remedy is 'ordinarily' first considered by [the] district court." Consolidated Gold Fields PLC v. Anglo American Corp., 713 F. Supp. 1455, 1456 (S.D.N.Y. 1989).

93. Strykers Bay Neighborhood Council, Inc. v. City of New York, 695 F. Supp. 1531 (S.D.N.Y. 1988). *See supra* notes 61-63 and accompanying text.

come housing.[94] Judge Connor stated that plaintiffs lacked standing unless they could show that they suffered a personal injury fairly traceable to the challenged conduct.[95] A preliminary injunction sought by plaintiffs was denied because "plaintiffs had failed to demonstrate either irreparable injury or probability of success on the merits."[96] The court found that "the harm alleged was too remote and speculative,"[97] . . . [and] "in view of the unavailability of other funding for the construction of low income housing, there was no reason to believe it would be constructed on the"[98] property even if the relief sought was granted.[99] Judge Conner stated that in order "[t]o establish a property interest in a benefit [the classification of the property for low income housing] a plaintiff must demonstrate a legitimate claim of entitlement derived from a source independent of the Constitution, such as an implied agreement or a statute."[100] He further concluded that "[t]he Constitution does not guarantee access to dwellings of a particular quality, nor does it require a local government to approve public housing in a particular location.[101]

Huntington obviously holds some perils for the unwary municipality and promise for civil rights plaintiffs. But the Supreme Court's careful treatment of the case will not impede any attempt by the Court in the future to pattern Title VIII law after current Title VII developments. It appears likely that a future case identical to *Huntington II* will not suffer the same result.

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94. *Id.* at 1534.

95. *Id.* at 1542. *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Warth v. Seldin, 442 U.S. 490, 501-02 (1975).

96. *Strykers Bay*, 695 F. Supp. at 1534.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1538 (citations omitted).

101. *Id.* at 1541 (citation omitted).